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In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT
v.
JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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QUESTIONS PRESENTED

1. Whether the provision in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254 (c)(2), authorizing one House of Congress to adopt a resolution invalidating an order of the Attorney General suspending the deportation of an alien and requiring the deportation of the alien is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

2. Whether the provision in Section 244(c)(2) authorizing one House of Congress to pass such a resolution is severable from the remainder of Section 244.

3. Whether the court of appeals had jurisdiction of this case under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a).

4. Whether the House of Representatives' and Senate's other jurisdictional and related arguments for avoiding a decision on the merits are correct.

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BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-63a) is reported at 634 F.2d 408. The decisions of the immigration judge (J.S. App. 64a-66a, 70a-71a; J.A. 46-48, 52-54) and the opinion of the Board of Immigration Appeals (J.S. App. 72a-73a; J.A. 55-56) are not reported.

JURISDICTION

The judgment of the court of appeals (80-2171 Pet. App. 84a) was entered on December 22, 1980, and the Immigration and Naturalization Service (INS) filed a notice of appeal in No. 80-1832 (J.S. App. 74a) on January 19, 1981. On March 13, 1981, Justice Rehnquist extended the time for docketing the appeal to and including May 1, 1981. The motions of the United States House of Representatives and the United States Senate to intervene were granted on March 10, 1981 (J.S. App. 75a), and their petition for rehearing was denied on March 25, 1981 (J.S. App. 76a). On April 16, 1981, the INS filed a second notice of appeal in No. 80-1832 (J.S. App. 77a-78a). See J.S. 2 n.1; Sup. Ct. R. 11.3. The jurisdictional statement in No. 80-1832 was filed on May 1, 1981, and the petitions for a writ of certiorari in Nos. 80-2170 and 80-2171 were filed on June 22, 1981. On October 5, 1981, this Court postponed the question of jurisdiction in No. 80-1832 to the hearing on the merits and granted the petitions for a writ of certiorari in Nos. 80-2170 and 80-2171. The jurisdiction of this Court in No. 80-1832 is invoked under 28 U.S.C. 1252, and in Nos. 80-2170 and 80-2171 under 28 U.S.C. 1254(1).[1]

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[1] We have fully addressed the question of this Court's jurisdiction under 28 U.S.C. 1252 in the reply brief for INS (at 1-10) filed in response to the motions of the Senate and House of Representatives to dismiss the appeal in No. 80-1832. Because the Court has granted the Senate and House of Representatives' certiorari petitions in Nos. 80-2170 and 80-2171 to review the same judgment, the issue of this Court's jurisdiction of INS's appeal under 28 U.S.C. 1252 is no longer of significance in this case.

This jurisdictional issue would be relevant only if, contrary to our contention (see pages 65-72 *infra*) and the holding below (J.S. App. 4a-11a), the Court were to conclude that the court of appeals did not have statutory jurisdiction of the case under 8 U.S.C. 1105a(a). In that event, the Court could not consider the merits of the case on the Senate and House of Representatives' certiorari petitions, because the case would not have been properly "in" the court of appeals for purposes of 28 U.S.C. 1254(1). See

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Articles I and II of the United States Constitution and Sections 106, 244 and 406 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1105a, 1254 and 1101 note, are set forth as an appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

1. Section 244(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254(a)(1), authorizes the Attorney General, in his discretion, to suspend the deportation of certain aliens who are otherwise deportable and to adjust their status to that of aliens lawfully admitted for permanent residence. In order to be eligible for this relief, an alien must be deportable under any law of the United States (except certain provisions not here applicable), must have been physically present in the United States for a continuous period of not less than seven years, must prove that during all of such period he has been a person of good moral character, and must be "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien" or to the alien's spouse, parent, or child who is a citizen or permanent resident alien of the United States. See *INS* v. *Wang*, 450 U.S. 139 (1981).

United States v. *Nixon*, 418 U.S. 683, 690-692 (1974). But no such limitation is contained in 28 U.S.C. 1252. Because one of the principal purposes of Section 1252 is to resolve doubts about the constitutionality of an Act of Congress, the jurisdiction of this Court under that Section to decide the merits of the constitutional issue does not depend on the jurisdiction of the lower federal court that first held the Act unconstitutional. *McLucas* v. *DeChamplain*, 421 U.S. 21, 32 (1975); *Williams* v. *Zbaraz*, 448 U.S. 358, 367-368 & n.10 (1980); cf. *Donovan* v. *Richland County Association for Retarded Citizens*, No. 81-255 (Jan. 11, 1982), slip op. 2-3 n.3. Because of the contingent nature of the possible relevance of the jurisdictional issue under 28 U.S.C. 1252, and because we are content in any event to rest upon the arguments previously made on that issue in the reply brief, we will not burden the Court with a rehearsing of those arguments here.

Section 244(c)(1) of the Act, 8 U.S.C. 1254(c)(1), provides that "[u]pon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) * * * the Attorney General may in his discretion suspend deportation of such alien." If the alien's deportation is suspended, "a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension" (*ibid.*). Section 244(c)(2) then provides that if, during the session of Congress in which the case is reported or the succeeding session, "either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law." However, if neither the Senate nor the House of Representatives passes a resolution of disapproval during the period provided, "the Attorney General shall cancel deportation proceedings" pertaining to the alien. *Ibid.* Section 244(d) in turn provides that, upon the cancellation of deportation, the Attorney General shall record the alien's lawful admission for permanent residence as of the date of cancellation. 8 U.S.C. 1254(d).

2.a. Appellee-respondent Chadha, who is a citizen of the United Kingdom, a native of Kenya, and of East Indian extraction (J.A. 8, 13, 20), was lawfully admitted to the United States in 1966 on a nonimmigrant student visa (J.A. 6, 22). His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service (INS) issued to Chadha an order to show cause why he should not be deported (J.A. 6). On January 11, 1974, a deportation hearing was commenced pursuant to Section 242 of the Act, 8 U.S.C. 1252, before an immigration judge (J.A. 7). Chadha conceded that he was deportable for overstaying his visa (J.A. 10), and the hearing was ad-

journed so that he could file an application for suspension of deportation (J.A. 21, 23). See J.S. App. 2a.

After Chadha submitted his application for suspension of deportation (J.A. 33-36), the deportation hearing was resumed on February 7, 1974 (J.A. 23). On the basis of evidence adduced at the hearing (J.A. 23-32), affidavits submitted with the application (J.A. 37-45), and the results of a character investigation conducted by the INS (J.A. 31), the immigration judge, on June 25, 1974, ordered that Chadha's deportation be suspended (J.S. App. 64a-66a; J.A. 46-48). The judge found that Chadha had resided continuously in the country for seven years, was of good moral character, and would suffer "extreme hardship" if deported. The finding of extreme hardship was based principally on the fact that "it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation" (J.S. App. 66a; J.A. 47-48).

b. Pursuant to Section 244(c)(1) of the Act, a report of the suspension of Chadha's deportation was transmitted to Congress (J.S. App. 69a). On December 12, 1975, approximately a year and a half after the immigration judge suspended Chadha's deportation, Representative Eilberg introduced a resolution (H.R. Res. 926, 94th Cong., 1st Sess.; see J.S. App. 69a) stating that "the House of Representatives does not approve the granting of permanent residence in the United States" to Chadha and five other aliens. 121 Cong. Rec. 40247 (1975). On December 16, 1975, the resolution was discharged from further consideration by the House Judiciary Committee. 121 Cong. Rec. 40800; J.S. App. 67a-68a. Although Representative Wylie observed that "[t]his resolution has not been available to the Members of the House for review because it was not printed" (121 Cong. Rec. 40800 (1975); J.S. App. 67a), Representative Eilberg emphasized that the disapproval resolution had to be passed during that session of Congress, which was about to end,[2] or the aliens

[2] The First Session of the 94th Congress (the session following that during which the suspension of Chadha's deportation was

named in the resolution would be granted permanent resident status (121 Cong. Rec. 40800 (1975); J.S. App. 68a). In support of the resolution, Representative Eilberg stated: "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet [the] statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended" (*ibid.*). The House passed the resolution without further debate or recorded vote (J.S. App. 69a). The resolution of disapproval was not passed by the Senate or presented to the President for his approval or disapproval.

c. Following the House of Representatives' passage of the resolution, the immigration judge reopened the deportation proceedings (J.S. App. 70a-71a; J.A. 49, 53). At the reconvened hearing, Chadha moved that the deportation proceedings be terminated on the ground that the one-House veto provision in Section 244(c)(2) is unconstitutional, but the immigration judge concluded that he had no authority to rule on the validity of an Act of Congress (J.A. 49, 53; J.S. App. 71a). Accordingly, on November 8, 1976, the judge ordered Chadha deported to the United Kingdom (J.S. App. 70a-71a; J.A. 52-54).

On appeal to the Board of Immigration Appeals, Chadha again contended that Section 244(c)(2) of the Act is unconstitutional and that the deportation proceedings from which his appeal was taken therefore should have been terminated (J.A. 52-54). The Board rejected this contention and dismissed the appeal, similarly concluding that it had no power to declare a federal statute unconstitutional (J.S. App. 73a; J.A. 55-56).

3. On March 24, 1977, Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit (J.A. 1), pursuant to Section 106(a) of the Immigration and Nationality Act,

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reported to Congress (see Section 244(c)(2)) ended three days later, on December 19, 1975, when the House and Senate adjourned sine die. 121 Cong. Rec. 42014, 42277.

8 U.S.C. 1105a(a).[3] Chadha again argued that the one-House veto provision in Section 244(c)(2) of the Act is unconstitutional. The INS also took the position that Section 244(c)(2) is unconstitutional. For this reason, the INS suggested to the court of appeals that it invite the Senate and House of Representatives to file briefs (J.A. 1); at the court's invitation, they did so.

The court of appeals cancelled Chadha's deportation, holding that the one-House veto provision in Section 244(c)(2) of the Act contravenes the procedural requirements in Article I of the Constitution for the exercise of legislative power and violates the constitutional principle of separation of powers.

a. The court of appeals concluded that the provision for one House of Congress to override suspension decisions is not a valid exercise of Congress' legislative authority under Article I of the Constitution because a one-House veto does not comply with "important formal and procedural limitations" in Article I, Section 7—principally, the requirement "that both houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights" (J.S. App. 59a). Thus, the court reasoned, if Chadha's status under Section 244 prior to the passage of the resolution of disapproval by the House of Representatives was one of *nondeportability*, based on the Attorney General's determination that his deportation should be suspended, "then obviously that status cannot be changed by one house" (J.S. App. 59a). But the court found the procedure equally violative of Article I, Section 7, if it were to accept the House and Senate's contention that Chadha's status prior to passage of the House resolution was one of *deportability*, which could be altered only if both Houses failed to object to the suspension of his deportation during the relevant time period (J.S. App. 59a-60a):

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[3] The petition for review had the effect of staying the deportation order pending the court of appeals' resolution of the case. 8 U.S.C. 1105a(a)(3).

> The article I authorization to make law does not permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation which is not a final exercise of specifically delegated power to alter these legal rights, followed by legislative inaction—an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference.

The court held that this departure from the requirements in Article I of the Constitution for enacting positive legislation was not supported by Congress' conceded power under Article I, Section 8, to "establish an uniform Rule of Naturalization * * * [and] to make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers * * *." The latter clause, the court explained, "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of that power" (J.S. App. 56a).

b. The court of appeals also found the one-House veto provision in Section 244(c)(2) to be contrary to the established doctrine of separation of powers more generally embodied in the Constitution. The purpose of this separation, the court concluded, is to prevent the "dangerous concentration of power in one branch" (J.S. App. 29a) and, thereby, "to preclude the exercise of arbitrary power" (*id.* at 30a, quoting *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

The court acknowledged that some practical accommodation and interdependence among the branches is necessary (J.S. App. 34a, 36a). At the same time, however, it recognized that judicial intervention is required to correct those "departures [from the constitutional assignment of powers] which undermine * * * the purpose mutually to check component powers * * *" (*id.* at 34a).

Section 244(c)(2), the court concluded, is one such prohibited departure, because it allows one House of Congress to reverse a reasoned decision, "rendered under

the law," that "was reached after the Executive had given consideration to an individual case" (J.S. App. 53a). The court rejected the suggestion that this "interference with essential executive functions" (*ibid.*) is justified because Section 244(c)(2) was intended to permit Congress "to share in the administration of the statute" by "fill[ing] the interstices of statutory criteria" (J.S. App. 52a). In the court's view, such "addition of more precise statutory criteria on an accretive, case-by-case basis is, in short, law enforcement" (*ibid.*; footnotes omitted); it is not merely "an attempt to alter future conduct of the Executive or to change its instructions" (*id.* at 54a). The court concluded in this regard that the Attorney General's informed and consistent implementation of the statute would be "thwarted if legislative interference, constant in its potentiality, can be exercised in any given case without a change in the general standards the legislature has initially decreed" (*id.* at 53a). Accordingly, Section 244(c)(2) "detracts from the authority of the second branch, and to that extent undermines its powers" (J.S. App. 53a-54a).

The court also rejected the related argument that the one-House veto could be viewed as a necessary "corrective device" (J.S. App. 47a) to remedy what either House of Congress might perceive to be misapplications of the statutory eligibility criteria in individual cases. "By assuming the task of correcting misapplications of the law," the court reasoned, "Congress is performing a role [that is] ordinarily a judicial or an internal administrative responsibility" (*id.* at 48a). In addition, the court found a potential for Section 244(c)(2) to result in arbitrary treatment of individual aliens because, under that Section, adjudications "may be set aside [by one House of Congress] for any reason, or no reason at all" (J.S. App. 50a), and "[t]here are virtually no procedural constraints on the ultimate congressional decision nor any provision for review of Congress' legal or factual conclusions" (*id.* at 51a). For these reasons, the court

concluded that Congress had violated the doctrine of separation of powers "by retaining a selective power to override individual adjudications, in lieu of changing standards prospectively by the usual, corrective device of a statutory amendment" (*ibid.*).[4]

SUMMARY OF ARGUMENT

I

A. Section 244(c)(2) of the Immigration and Nationality Act allows one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be cancelled under the Act. The effect of a resolution passed by one House pursuant to that Section therefore is precisely the same as that of a duly enacted *law* amending the Act to exclude a particular alien from eligibility for relief. If Section 244(c)(2) had never been enacted, it is clear that a resolution passed by one House of Congress and not approved by the President or repassed by both Houses over his veto would not bind the Attorney General in his administration of the Act or affect the legal status of an individual alien.

The Senate and House of Representatives contend, however, that Congress may accomplish this result indirectly simply by enacting legislation *authorizing* either of its Houses to pass a resolution having binding effect. They assert in this regard that not every exercise of legislative power requires adherence to the constitutional

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[4] As explained in the Brief of Appellee-Respondent Chadha (at 7-10), the court of appeals also addressed a number of procedural and jurisdictional arguments raised by the congressional *amici*. The court of appeals rejected the House and Senate's contentions that it did not have jurisdiction of the case on Chadha's petition for review under Section 106(a) of the Act (J.S. App. 4a-11a). The court also concluded that Chadha had standing to challenge the constitutionality of Section 244(c)(2) (J.S. App. 12a-19a), that the case does not present a non-justiciable political question (*id.* at 20a-22a), that the case involves a concrete controversy satisfying Article III requirements (*id.* at 22a-24a); and that Chadha's marriage to a United States citizen did not moot the case (*id.* at 17a-18a n.6).

requirements for the making of a law. This contention is plainly incorrect, for this Court has made clear that the legislative power granted to Congress by Article I, Section 1, is " 'the authority to make laws' " (*Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976) (per curiam), quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928)), and the Necessary and Proper Clause authorizes Congress "to make all *Laws*" for carrying into execution its enumerated powers.

The requirement of bicameral approval of all measures constituting the exercise of legislative power also is evident from Article I, Sections 1 and 8, which grant legislative power to *Congress*, not to either of the Houses of which it consists. Section 7, Clause 2 of Article I, then provides that "*Every* Bill" which shall have so passed the House of Representatives and the Senate "shall, before it becomes a Law," be approved by the President or be repassed over his veto. What is more, the Framers included a *second* Presentation Clause in Section 7, Clause 3, for the specific purpose of ensuring that the negative of the President could not be evaded by Congress simply by calling a measure intended to have the effect of a law something other than a "Bill"—*e.g.*, a "Resolution," the very label given the measure passed by the House of Representatives in this case.

By providing an opportunity for due deliberation by the two differently constituted Houses of Congress and a detached review of all proposed legislation by the President, the Framers intended to protect against improvident and ill-considered exercises of legislative power and encroachment upon the Executive. These concerns of the Framers are fully implicated when Congress or one of its Houses seeks to exercise legislative power by means of a "legislative veto" of Executive action.

The conclusion that the concurrence of both Houses and presentation to the President are required with respect to all exercises by Congress of its legislative powers is further supported by the fact that, in situations in which the Framers intended a *departure* from those re-

quirements, they *expressly* so provided. Of particular significance is the Treaty Clause in Article II, Section 2, which allows the Senate to participate in a form of "lawmaking" with the President, to the exclusion of the House. Other examples of departures from the norm of bicameral action and Presidential review are contained in Article I, such as in the Clauses pertaining to the internal organization of each House, impeachment, and adjournment. Significantly none of these examples involves the exercise of Congress' legislative power to regulate the affairs of persons outside the Legislative Branch, and each is explained by special attributes of the function involved and is accompanied by alternative checks on the legislature.

Nor can the unconstitutionality of Section 244(c)(2) be avoided simply by characterizing that Section in another way, as providing for the Attorney General to make a *recommendation* that *Congress* suspend an alien's deportation, which Congress then may approve by *inaction* if neither House passes a resolution of disapproval. This characterization is refuted by the language and legislative history of Section 244(c)(2). In any event, the history of the Presentation Clauses clearly shows that Congress cannot avoid submitting a legally binding resolution to the President simply by attaching a different label to it or by recharacterizing the process that led to its passage. Furthermore, the Constitution does not permit a substantive change in the law to be accomplished by the submission of an Executive recommendation to Congress, followed by mere inaction of the two Houses.

B. Section 244(c)(2) also violates the doctrine of separation of powers by directly involving one House of Congress in the execution of the Immigration and Nationality Act. That Section permits one House to overrule a decision of the Attorney General, much as the President might direct or overrule the decision of a subordinate official in the Executive Branch, and vests in Congress the final decision whether an individual alien will be deported under the Act.

The invalidity of Section 244(c)(2) in this respect follows a fortiori from the Court's decision in *Buckley* v. *Valeo*, *supra*. If, as the Court held in *Buckley*, Congress cannot vest in one of its Houses the authority to appoint the Officers of the United States who in turn will administer the laws, then surely Congress cannot take the more extreme step of vesting in one House itself the power to participate directly in the administration of the laws.

Section 244(c)(2) cannot be saved from invalidity on separation of powers grounds on the theory that the Executive is a mere agent of Congress who exercises whatever "legislative power" is delegated to it by Congress. The Executive does not exercise "legislative power"; that is the authority to *make* laws. The authority to execute the laws is granted directly by the Constitution, not "delegated" by Congress. Moreover, the Executive Branch is an independent agent of the *law*, not of Congress, as evidenced by the President's constitutional duty to take care that the "Laws" be faithfully executed. To the extent that the Legislative Branch may direct Executive action, it is only by passing such "Laws."

C. If Section 244(c)(2) were held to be constitutional, Congress apparently could pass legislation authorizing one of its Houses to overrule *any* order or decision of an Officer of the United States in his administration of the laws. The result would be to blend all legislative and executive powers in the same hands and to sanction a wholesale departure from the constitutionally prescribed means for exercising legislative power.

D. If the one-House veto provision in Section 244(c)(2) is held unconstitutional, it properly may be severed from the remainder of Section 244. The settled rule is that an unconstitutional provision may be severed unless it is *evident* that the legislature would not have enacted the remainder of the statute standing alone, and the presence of a strong severability clause in Section 406 of the Act greatly enhances the presumption of severability in this case. If Section 244 were struck down in its entirety,

Congress would be forced to grant permanent resident status itself through the passage of private bills. The legislative history makes clear, however, that for aliens covered by Section 244(c)(2), Congress specifically rejected the previous practice under which the granting of permanent resident status required such affirmative approval of both Houses.

II

The court of appeals had jurisdiction to consider the constitutional issue on Chadha's petition for review under Section 106(a) of the Act, which grants the courts of appeals "exclusive" jurisdiction of actions seeking judicial review of "final orders of deportation." The validity of the deportation order entered against Chadha is entirely dependent upon the validity of the one-House veto provision in Section 244(c)(2). Moreover, this Court held in *Foti* v. *INS*, 375 U.S. 217 (1963), that the court of appeals' jurisdiction under Section 106(a) encompasses not only the issue of the alien's deportability, but also a denial of suspension of deportation that is merged into a final order of deportation. Nothing in Section 106(a) or its legislative history suggests that constitutional challenges are implicitly excepted from the court of appeals' "exclusive" jurisdiction under that Section, and to force an alien to bring his constitutional challenge to a deportation order in a separate proceeding in the district court would undermine the congressional intent to create a single statutory form of judicial review.

This is not a "feigned" suit, as the House of Representatives suggests. The immigration judge and Board of Immigration Appeals simply followed the well-established practice of declining to rule on the constitutionality of a statute at the administrative level, thereby leaving such issues for judicial resolution, just as the Executive agencies did in *United States* v. *Lovett*, 328 U.S. 303 (1946). Nor are the House and Senate correct that Chadha cannot be heard to challenge the legislative veto provision in Section 244(c)(2) because it is not severable and because he therefore could not be afforded

relief from deportation even if he were to prevail on the constitutional issue. The legislative veto provision plainly is severable, and Chadha accordingly can be granted such relief and permanent resident status if the one-House veto provision is declared unconstitutional. But in any event, this Court has repeatedly held that a party may raise a constitutional challenge even if the provision in question ultimately may not be severed in a way that would entitle him to relief.

ARGUMENT

I. THE PROVISION IN SECTION 244(c)(2) OF THE IMMIGRATION AND NATIONALITY ACT AUTHORIZING ONE HOUSE OF CONGRESS TO DISAPPROVE THE ATTORNEY GENERAL'S DECISION SUSPENDING AN ALIEN'S DEPORTATION, AND THEREBY TO REQUIRE THE ATTORNEY GENERAL TO DEPORT THE ALIEN, IS UNCONSTITUTIONAL

Section 244(c)(2) of the Immigration and Nationality Act authorizes one House of Congress, acting alone, to require the Attorney General to deport an alien who otherwise would not be deported under the immigration laws. The effect of a resolution passed by one House under that Section is to amend the Act to exclude a particular alien from the relief generally afforded to aliens who are found by the Attorney General, after a hearing, to be eligible for suspension of deportation and permanent resident alien status. Section 244(c)(2) therefore authorizes an unconstitutional exercise of Congress' legislative powers, for it allows one House of Congress to take action having the effect of a law without regard to the explicit requirements in Article I of the Constitution that *any* resolution having such an effect must receive the concurrence of both Houses and be submitted to the President for his approval or disapproval. In the event of disagreement between Congress and the President, the congressional view may prevail only if two-thirds of each House concur. These fundamental protections against precipitate and improvident action by the

Legislative Branch and encroachment upon the Executive that are embodied in the Constitution cannot be evaded by mere legislation passed by Congress purporting to authorize such an evasion. Indeed, Congress is the very Branch of Government whose powers were intended by the Framers to be restrained by the requirements of bicameralism and presentation to the President.

Section 244(c)(2) also violates the doctrine of separation of powers under the Constitution by involving the Legislative Branch in the execution of a previously enacted law. It permits one House of Congress to overrule a particular determination made by the Officer of the United States charged with administering the Immigration and Nationality Act and to direct that Officer to make a different disposition of the case, just as the President might instruct subordinate Executive Branch officials in fulfillment of his constitutional obligation to "take Care that the Laws be faithfully executed" (Art. II, § 3). Such overruling of individual determinations under the Immigration and Nationality Act, when not accomplished by means of a duly enacted law amending that Act, plainly constitutes the execution of the law—a function that the Framers deliberately withheld from Congress and assigned instead to the President and other officers of the Executive Branch.

If Section 244(c)(2) were found to be constitutional, it would appear that Congress could pass general legislation permitting one of its Houses to disapprove *every* decision or action by the President or any other Officer of the United States in executing a law. The result would be to transform the process embodied in the Constitution for the exercise of legislative power, to strip the Executive Branch of the independence the Framers plainly intended it to have, and to transfer to the Legislative Branch the ultimate decision-making authority in the execution of the laws. This Court must reject the attempt by Congress to bring about such a fundamental restructuring of the form of government established by the Constitution.

A. Section 244(c)(2) Violates Article I of the Constitution Because It Authorizes One House of Congress To Exercise Legislative Power By Passing A Resolution That Has the Effect of a Law Without the Concurrence of the Other House Or Presentation to the President

1. *If Section 244(c)(2) Had Not Been Enacted, a Resolution Passed By One House And Not Presented to the President for Approval or Disapproval Clearly Would Not Bind the Attorney General or Affect Chadha's Legal Status*

Section 244(a)(1) of the Immigration and Nationality Act authorizes the Attorney General, in his discretion, to suspend the deportation of an alien and to grant permanent resident status to that alien if he satisfies certain threshold eligibility criteria and if his deportation would, "in the opinion of the Attorney General, result in extreme hardship to the alien" or to his spouse, parent, or child who is a citizen or permanent resident alien. See *INS* v. *Wang*, 450 U.S. 139, 144-145 (1981). As a procedural matter, if the Attorney General determines that an alien is eligible for the relief afforded by Section 244 and that an exercise of discretion in favor of the alien is warranted, the Attorney General first suspends the alien's deportation. The Attorney. General then must submit a complete report of the case and the reasons for the suspension to Congress. Section 244(c)(1). The Act provides that if neither House of Congress passes a resolution disapproving the suspension, the Attorney General "shall" cancel the deportation proceedings and grant permanent resident status to the alien. Section 244(c)(2) and (d). However, if either House passes a resolution "stating in substance that it does not favor the suspension of deportation" (Section 244(c)(2)), the suspension is terminated and the Attorney General "shall" deport the alien (*ibid.*), notwithstanding the prior administrative determination that the alien is entitled to relief under the statute.

In the present case, after the immigration judge found Chadha eligible for relief under Section 244 and suspended his deportation, the House of Representatives passed a resolution stating that it "does not approve the granting of permanent residence in the United States" to Chadha and five other aliens (H.R. Res. 926, 94th Cong., 1st Sess. (1975); J.S. App. 69a). Following passage of this resolution, the judge entered an order of deportation against Chadha. Thus, as exemplified by this case, Section 244(c)(2) of the Immigration and Nationality Act allows one House of Congress to require the Attorney General to deport an alien who otherwise would not be deported under the immigration laws. The effect of a resolution passed by one House pursuant to Section 244(c)(2) therefore is precisely the same as that of a *law* amending the Immigration and Nationality Act to exclude a particular alien from the relief afforded to those aliens who are found by the Attorney General after a hearing to be eligible for and deserving of suspension of deportation and adjustment of status.

If Section 244(c)(2) had never been enacted, it could not seriously be contended that a resolution passed by only one House of Congress and not approved by the President or repassed by both Houses over his veto would bind the Attorney General in his administration of the Immigration and Nationality Act or affect the legal status of an individual alien under that Act. The explicit constitutional requirements of bicameral action and presentation to the President, contained in Sections 1, 7 and 8 of Article I, discussed below (see pages 21-26 *infra*), would stand as insuperable barriers to giving such a resolution the effect of a duly enacted law. See *United States* v. *California*, 332 U.S. 19, 27-28 & n.4 (1947); *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 180 (1901); *id.* at 184 (Brown, J., concurring); *New York Indians* v. *United States*, 170 U.S. 1, 23 (1898); *Field* v. *Clark*, 143 U.S. 649, 669-672 (1892); 6 Op.

Att'y Gen. 680 (1854).[5] A resolution passed by just one House can be a useful means by which that House may express its opinion on a particular matter pending before an Executive officer.[6] But mere opinions of the Legislative

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[5] In the Attorney General's opinion cited, Attorney General Cushing was concerned with the effect of congressional resolutions that purported to direct the payment of a claim that previously had been denied under an Act of Congress by the Commissioner of Pensions and Secretary of the Interior. His reasoning is equally applicable here (6 Op. Att'y Gen. at 684-685; first and third emphasis added):

> [T]he Constitution has *not* given to either branch of the legislature the power, by separate resolution of its own, to construe, judicially, a general law, or to apply it executively to a given case. And its resolutions have obligatory force only so far as regards itself or things dependent on its own separate constitutional power.
>
> *Any other view of the subject would result in the absurd conclusion that a separate resolution of either House could repeal or modify an act of Congress.* For, as the Supreme Court well say, in one of the cases before cited, a Head of Department "must exercise his judgment in *expounding* the acts and resolutions of Congress, under which he is, from time to time, required to act." That exposition of the law, conscientiously made by him, and with the aid of the law officer of the Government, is the law of the case. * * * In fine, it becomes the law; that is, the authorized construction of the legal intendment of the act of Congress. *That ascertained legal intendment of a statute cannot be authoritatively changed by a separate resolution of either or of both Houses; but only by a new act of Congress.*

See also S. Rep. No. 1335, 54th Cong., 2d Sess. 2, 8 (1897), discussed at note 12 *infra*; VII *Cannon's Precedents of the House of Representatives* § 1037, at 150 (1935) ("A concurrent resolution is without force and effect beyond the confines of the Capitol"), quoting 42 Cong. Rec. 2661 (1908) (remarks of Rep. Mann, referring to S. Rep. No. 1335 *supra*).

[6] See *Jefferson's Manual of Parliamentary Practice*, Section XXI (1797) ("When the House commands, it is by an 'order.' But fact, principles, and their own opinions and purposes, are expressed in the form of resolutions."), *reprinted in* H.R. Doc. No. 96-398, 96th Cong., 2d Sess. 173 (1981). Concurrent resolutions now are utilized to express the opinions of the two Houses. *Id.* at 173, § 396, citing II *Hinds' Precedents of the House of Representatives* §§ 1566, 1567, at 1029 (1907).

Branch, or one of its Houses, obviously do not have the force of a law. See *Train* v. *City of New York*, 420 U.S. 35, 45 (1975) ("legislative intention, without more, is not legislation").[7] Indeed, in this case, neither the Senate nor the House contends that it has the authority under the Constitution, standing alone, to pass a resolution having binding effect on the Attorney General or any other Executive officer in the performance of his official duties or affecting the legal rights and liabilities of persons outside the Legislative Branch.

The House and Senate do contend, however, that Congress may accomplish what the Constitution does not permit simply by enacting legislation authorizing either House to pass a resolution that purports to bind the Executive and have a legal effect upon private parties and requiring the Executive to abide by such a resolution. Thus, although the House of Representatives repeatedly insists (Br. 33, 36-39) that one House's passage of a resolution of disapproval pursuant to Section 244(c)(2) is an exercise of Congress' "legislative power" over immigration and naturalization, the House nevertheless argues (Br. 39-41) that Article I of the Constitution does not require affirmative bicameral action and presentation to the President every time such legislative power is exercised. The Senate makes essentially the same argument, asserting (Br. 32) that although Congress has retained to itself "the ultimate responsibility of determining when to waive the mandatory provisions of the deportation laws," the approval or dis-

[7] See T. Cooley, *A Treatise on Constitutional Limitations* 266 (8th ed. 1927):

> [N]ot only is it important that the will of the law-makers be clearly expressed, but it is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.

approval by one House of a suspension of deportation in a particular case does not require the concurrence of the two Houses or presentation to the President (Br. 33). Contrary to the House and Senate's assertion, however, the text of the Constitution and the debates surrounding its adoption conclusively refute the contention that certain exercises of legislative power are implicitly exempt from the constitutional requirements of bicameral action and presentation to the President.

2. *The Constitution Explicitly Requires That All Congressional Actions Constituting the Exercise of Legislative Power Receive the Concurrence of Both Houses And Be Presented to the President for His Approval or Disapproval*

The Constitution plainly bars Congress from assigning to one of its Houses, acting alone, the authority to exercise legislative power by passing measures that are intended to have legal effect outside the Legislative Branch. Such lawmaking may be accomplished only by the combined action of both Houses of Congress and the President, or by two-thirds of each House in the event of Presidential disagreement.

Article I, Section 1 of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

As this Court has stressed, the legislative power granted by Article I is "the authority to make laws." *Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976), quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); see also *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). In the words of Chief Justice Marshall, "[c]ould it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation?" *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819); see also *The Pocket Veto Case*, 279 U.S. 655, 682 (1929), quoted in note 11 *infra*.

That Congress may exercise its "legislative Powers" only through the making of laws also is evident from the face of Article I, Section 8 of the Constitution. Section 8 enumerates the "legislative Powers" to which Section 1 of Article I refers, including that conferred by Clause 4, involved in this case, "[t]o establish an uniform Rule of Naturalization." The last Clause in the Section then authorizes Congress "to make all *Laws* which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (Art. I, § 8, cl. 18; emphasis added). The Clause could not be plainer that Congress is to exercise its legislative powers by making "Laws." See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-588 (1952). Indeed, as Alexander Hamilton stated in explaining the import of the Necessary and Proper Clause:

> What is a LEGISLATIVE power but a power of making Laws? What are the *means* to execute a LEGISLATIVE power but Laws?

The Federalist No. 33 (A. Hamilton), at 204-205 (J. Cooke ed. 1961).[8] See also *The Federalist* No. 75 (A. Hamilton), at 504 ("The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of the society").

The conclusion that Congress can regulate the affairs of persons outside the Legislative Branch only through the passage of laws is compelled as well by the very explicitness of the Constitution regarding the manner in which legislative power is to be exercised and the "Laws" of which the Constitution speaks are to be made. Because Article I, Section 1 vests "*All* legislative Powers" jointly in the Senate and House of Representatives (emphasis added), *every* bill or resolution constituting an exercise of legislative power—*i.e.*, every action that will

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[8] All citations to *The Federalist* are to the J. Cooke edition, unless otherwise noted.

have the effect of a law binding persons outside the Legislative Branch[9]—must be passed by both the Senate and the House.[10] This requirement of bicameral action is embodied as well in Article I, Section 8, which provides that "The Congress," not either of the Houses of which it consists (see Art. I, § 1; *Wright* v. *United States*, 302 U.S. 583, 587 (1938)), shall have the enumerated powers, including the establishment of a uniform rule of naturalization and the making of necessary and proper "Laws." Section 7, Clause 2 of Article I, then provides, in pertinent part (emphasis added):

> Every Bill *which shall have passed the House of Representatives and the Senate*, shall, before it be-

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[9] Cf. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302, 309 (1979).

[10] The requirement of a concurrence by both Houses, embodied in Article I, Section 1, is illuminated by the debates of the Constitutional Convention on that Section. The version of what is now Article I, Section 1, that was contained in the draft constitution reported by the Committee of Detail on August 6, 1787 provided:

> The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall[,] in all cases[,] have a negative on the other.

2 M. Farrand, *The Records of the Federal Convention of 1787*, at 177 (1966). In the debate on this provision the following day, Madison moved to strike out the language providing that each House would have a negative on the actions of the other, "the idea being sufficiently expressed in the preceding member of the Article; vesting the 'legislative power' in 'distinct bodies' especially as the respective powers and mode of exercising them were fully delineated in a subsequent article." *Id.* at 197. The "mode of exercising" the legislative power set forth in a "subsequent article" was through the enactment of a law. See *id.* at 182. Madison's motion carried (*id.* at 197), and the clause was referred to the Committee of Style without the language appearing after the semi-colon (*id.* at 565). The substance of this provision was reported by that Committee to the Convention in the form subsequently adopted as Article I, Section 1. 2 Farrand, *supra*, at 590. The Committee's addition of the word "All" to the beginning of Section 1 further confirms that the concurrence of the two Houses is required for *all* exercises of legislative power.

> comes a *Law*, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated.

If the President disapproves the bill, "it shall become a *Law*" only if two-thirds of each House vote to override the President's veto (*ibid.*; emphasis added).[11]

If Clause 2 of Section 7 had stood alone, it might have been possible to argue that the requirement of presentation to the President could be evaded if Congress or one of its Houses sought to exercise legislative power by some means other than the passage of a "Bill," to which Clause 2 expressly refers—*e.g.*, by passage of a "resolution," such as that passed by the House of Representatives in the instant case. But that very possibility was foreseen and foreclosed by the Framers. During the debate on Clause 2 of Article I, Section 7, Madison—

> observing that if the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes &c—proposed that "or resolve" should be added after "*bill*" • • • with an exception as to votes of adjournment &c.

2 M. Farrand, *The Records of the Federal Convention of 1787*, at 301 (1966) (emphasis in original). Although Madison's proposal at first was rejected (*id.* at 302), it was renewed the following day by Edmund Randolph, who put the proposal in a new form that was adopted by a 9 to 1 vote (*id.* at 304-305). This provision is embodied in Clause 3 of Article I, Section 7:

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[11] In *The Pocket Veto Case*, 279 U.S. 655 (1929), the Court, in referring to the requirement in Article I, Section 7, Clause 2, that a bill disapproved by the President be passed by two-thirds of each House in order to become a law, stated that " 'the context leaves no doubt that the provision was dealing with the two houses as *organized and entitled to exert legislative power*,' that is, the legislative bodies 'organized conformably to law for the purpose of *enacting legislation*' " (279 U.S. at 682, quoting *Missouri Pacific Ry.* v. *Kansas*, 248 U.S. 276, 280-281 (1919) (emphasis added)).

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representative may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

As we have explained (see pages 22-24 *supra*), the "Concurrence" of the Senate and House of Representatives is "necessary" under the Constitution whenever Congress seeks to exercise the "legislative Powers" granted by Article I, Sections 1 and 8 to the two Houses jointly.[12]

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[12] The Senate Judiciary Committee interpreted Section 7, Clause 3 in precisely this manner after a thorough historical study in 1897, remarking that the concurrence of both Houses and presentation to the President is necessary under the Constitution in the case of all resolutions that "contain matter which is properly to be regarded as legislative in its character and effect" (S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897)). Based on a comprehensive review of resolutions passed from the time of the First Congress, the Committee concluded (*id.* at 2; emphasis added):

> [T]he phrase [in Art. I, § 7, cl. 3] "to which the concurrence [of the Senate and House of Representatives] may be necessary" should be held to refer to the "concurrence" made "necessary by the other provisions of the Constitution and not to mere form of the procedure; so that no mere resolution, joint, concurrent, or otherwise need be presented to the President for his approval unless it relates to matter of legislation to which the Constitution requires the concurrence of both Houses of Congress and the approval of the President—in other words, *unless such Congressional action be the exercise of "legislative powers" vested in Congress under the provisions of section 1, article 1.*

In any event, it is clear that the Framers could not have intended for Congress to be able to evade the presentation requirement in Clause 3 of Article I, Section 7, merely by delegating to one of its Houses the authority to pass a resolution purporting to have binding legal effect outside the Legislative Branch. As one commentator has observed: "It verges on irrationality to maintain that

Sections 1, 7, and 8 of Article I of the Constitution thus make clear that the concurrence of the other House and presentation to the President are required in *any* instance in which one House of Congress seeks to exercise Congress' legislative powers by passing a resolution having the effect of a law.[13] The one-House veto provision in Section 244(c)(2) is unconstitutional because it authorizes either House of Congress to pass a binding resolution that does not comply with these explicit requirements.

3. *A Consideration of the Purposes the Framers Intended to Be Served By the Requirement of Bicameral Approval and Presentation to the President Strongly Reinforces the Conclusion that the One-House Veto Provision in Section 244(c)(2) is Unconstitutional*

A consideration of the intent of the Framers underlying the constitutional principles of bicameralism and Presidential review of legislation strongly reinforces the conclusion, compelled by the text of Article I itself, that the one-House veto provision in Section 244(c)(2) is unconstitutional. The debates surrounding the adoption of the Constitution leave no doubt that the procedure established in that document for the exercise of legislative power was not a mere formality to be disregarded, as the Senate and House of Representatives urge, whenever

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action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt." Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1066 n.428 (1975). *Cf. Powell* v. *McCormack*, 395 U.S. 486, 536-537 n.69 (1969).

[13] See also Section 11 of the Northwest Territory Ordinance, passed on July 13, 1787, while the Constitutional Convention deliberated. That Section provided that all bills that passed both chambers of the territorial legislature would be referred to the governor for his assent, "but no bill, or *legislative act whatever*, shall be of any force without his assent" (emphasis added). The Northwest Territory Ordinance was reenacted by the first Congress (ch. 8, 1 Stat. 50).

Congress might believe it more convenient to exercise that power in some other way. To the contrary, the constitutional requirements that all measures having the effect of a law must receive the concurrence of both Houses and must be presented to the President for his approval or disapproval were intended to be fundamental checks against oppressive, improvident, or precipitate action by the Legislative Branch and encroachment by that Branch upon the Executive. The Framers' deep concern for safeguards in the procedure for regulating the affairs of the Nation and the destiny of its people reflects as well their commitment to establish "a government of laws and not of men" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also *United States* v. *United Mine Workers*, 330 U.S. 258, 307-308 (1947) (Frankfurter, J., concurring)).

a. The principle of separation of powers that undergirds the Constitution was viewed by the delegates to the Constitutional Convention as a "vital check against tyranny" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 121; see, *e.g.*, *The Federalist* No. 47 (J. Madison), at 324), a check "essential to the preservation of liberty" (*The Federalist* No. 51 (J. Madison), at 348; see *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 348 U.S. at 635 (Jackson, J., concurring)). Accordingly, "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 122.

The Framers were acutely aware, however, that "[i]n republican government the legislative authority, necessarily, predominates." *The Federalist* No. 51, *supra*, at 350. Indeed, "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 129; see *id.* at 129 n.166). One of the checks the Framers

fashioned against this potential, Madison explained, was "to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit" (*The Federalist* No. 51, *supra*, at 350).[14] But this division was intended to protect against tyranny by the legislature in a more direct way as well, by providing an internal check against corrupt, oppressive, improvident, or ill-considered legislative measures.

Thus, James Wilson, later a Justice of this Court, observed during the debates of the Constitutional Convention:

> Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory and practice proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. *In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.*

1 M. Farrand, *supra*, at 254 (emphasis added). Similarly, Madison, in expounding upon the necessity of the Senate, noted "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions." *The Federalist* No. 62 (J. Madison), at 418. This propensity would be checked, he maintained, by providing a greater opportunity for due deliberation in the course of consideration by the two differently constituted Houses. *Id.* at 417-419. See also *The Federalist* No. 63 (J. Madison), at 426-427.

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[14] One defect the Framers had perceived in the Articles of Confederation was their provision for a Congress consisting of a single chamber. *The Federalist* No. 22 (A. Hamilton), at 145.

The check of bicameralism also was expected to assure stability of the laws, particularly in view of the greater continuity of the Senate and the longer terms served by its Members. *The Federalist* No. 62, *supra*, at 419-422. "[M]utable policy," Madison stressed, "poisons the blessings of liberty itself" (*id.* at 421; emphasis added):

> It will be of little avail to the people that the laws are made by men of their own choice, * * * if they * * * undergo such incessant changes that no man who knows what the law is to-day can guess what it will be tomorrow. *Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?*

Madison feared that "the most deplorable effect" of such mutability would be the "diminution of attachment and reverance" the people would have towards the political system that fostered it. *Id.* at 422.

The views expressed by Madison regarding the fundamental importance of concurrent action by the two Houses of Congress in their exercise of legislative power were voiced time and again in the debates of the Constitutional Convention and the state ratifying Conventions.[15] See generally I J. Story, *Commentaries on the Constitution of the United States* §§ 545-570, at 381-394 (3d ed. 1858).

b. The provision in Article I, Section 7, of the Constitution that a measure which has received the concurrence of the Senate and House of Representatives cannot become a law unless approved by the President or repassed over his objections by two-thirds of each House was viewed as another aspect of the system of checks and

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[15] See, *e.g.*, 1 M. Farrand, *supra*, at 151, 421-423 (remarks of James Madison); *id.* at 414 (remarks of Oliver Elsworth); II *Elliot's Debates on the Federal Constitution* 285 (1836) (remarks of John Jay in the New York Convention); *id.* at 301-302, 316-317 (remarks of Alexander Hamilton in the New York Convention); *id.* at 445, 447-448 (remarks of James Wilson in the Pennsylvania Convention); *id.*, vol. IV, at 21 (remarks of Mr. Davie in the North Carolina Convention); *id.* at 257 (remarks of Charles Pinckney in the South Carolina Convention).

balances embodied in the Constitution as a "self-executing safeguard" against encroachment by the Legislative Branch upon the independence of the Executive. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 122. See *The Federalist* No. 51, *supra*, at 350; see also *The Federalist* No. 73 (A. Hamilton) at 497 (quoted at page 57 *infra*); *The Federalist* No. 66 (A. Hamilton), at 445-446; 1 M. Farrand, *supra*, at 97-106; *id.* at 139-140 (remarks of George Mason). But the Presentation Clauses also were intended by the Framers to "guard[] against ill-considered and unwise legislation." *The Pocket Veto Case*, *supra*, 279 U.S. at 678; see also *id.* at 677-678 n.4; *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 587. This Court has observed, for example, that "[i]t can hardly be gainsaid that resolutions secure passage more casually and less responsibly, in the main, than do enactments requiring Presidential approval." *United States* v. *Rumely*, 345 U.S. 41, 46 (1953). Thus, Hamilton explained in *The Federalist* No. 73, at 495-496, that conferring the veto power on the President

> encrease[s] the chances in favor of the community, against the passing of bad laws, through haste, inadvertence, or design. The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those misteps which proceed from the contagion of some common passion or interest. It is far less probable, that culpable views of any kind should infect all the parts of the government, at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them.

See generally 1 J. Story, *supra*, §§ 884-893, at 614-621.[16]

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[16] See also 1 M. Farrand, *supra*, at 108, 139 (remarks of James Madison); 2 M. Farrand, *supra*, at 73 (remarks of James Wilson); *id.* at 74, 587 (remarks of James Madison); *id.* at 78 (remarks of George Mason); 3 M. Farrand, *supra*, at 148-149 (remarks of James McHenry before the Maryland House of Delegates). But see *Buckley* v. *Valeo*, *supra*, 424 U.S. at 285 (opinion of White, J.).

Moreover, as James Wilson stressed to the Pennsylvania Convention, lodging a power in the President to disapprove legislation was expected to serve a beneficial purpose because the President would feel a sense of responsibility to the Nation as a whole, not merely to particular parts thereof, as might elected representatives in the Congress. II *Elliot's Debates*, *supra*, at 448. See also *Myers* v. *United States*, 272 U.S. 52, 123 (1926). Wilson further emphasized that in reviewing a measure, the President "will have before him the fullest information of our situation; he will avail himself not only of records and official communications, foreign and domestic, but he will have also the advice of the executive officers in the different departments of the general government." *Ibid.*; see also U.S. Const., Art. II, § 2, cl. 1 (the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices").

c. As this case well illustrates, the concerns of the Framers that underlie the constitutional requirements of concurrent action by the two Houses of Congress and presentation to the President apply with full force when one or both Houses seek to exercise legislative power by means of a "legislative veto" of Executive action. One need not question the good faith of the Members of the House of Representatives who proposed and voted for the resolution disapproving Chadha's deportation to notice that the resolution was passed in haste at the close of a legislative session in order to meet the deadline in Section 244(c)(2) for the passage of such a resolution. The resolution, which was not even available to the Members because it had not been printed, was approved on the basis of nothing more than Representative Eilberg's fleeting explanation that it was the Judiciary Committee's "feeling" that Chadha and the other aliens mentioned in the resolution did not satisfy the statutory eligibility criteria, especially that of "extreme hardship."

121 Cong. Rec. 40800 (1975); J.S. App. 67a-68a.[17] This is precisely the sort of precipitate action by a legislative body for which the Framers designed the "self-executing safeguard[s]" of due deliberation by a second body and review by the President.[18]

Furthermore, to the extent the House of Representatives' passage of the resolution rested on the Judiciary Committee's interpretation of the "extreme hardship" criterion, this Court observed just last Term that "[t]hese words are not self-explanatory, and reasonable men could easily differ as to their construction" (*INS* v. *Wang*, *supra*, 450 U.S. at 144). Accordingly, an exercise of legislative power that purported to apply this standard in a particular case might well have benefited from the opportunity for due deliberation and a detached second opinion that the Framers intended to be afforded by bicameral consideration of proposed legislation. Such an exercise of legislative power would have benefited as well from an opportunity for independent consideration by the President, after receiving the advice of the Attorney General and his delegates in the INS who are charged generally with administering the immigration laws and specifically with defining and applying the

[17] This is not to say, of course, that a duly enacted *law* must be preceded by extensive debate or supported by a public record establishing a full awareness on the part of the Members of the nature of their actions. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980). The essential point is that the Framers expected that bicameral action and the prospect of review by the President would serve as *built-in* mechanisms to foster deliberation and awareness on the part of the Members. See, *e.g.*, J. Madison, *Notes of Debates in the Federal Convention of 1787*, at 63 (Ohio Univ. Press. ed. 1966).

[18] There is no indication in this case that passage of the resolution resulted from malice toward Chadha, either by the House of Representatives or its Members or by anyone outside that body. Nor is there any indication in this case that the House yielded to the forces of faction or momentary political or regional passion or "the artful misrepresentations of interested men" (*The Federalist* No. 63 (J. Madison), at 425). But these factors may be present in other cases, and Section 244(c)(2) and similar statutory provisions do not respect the constitutional checks against them.

"extreme hardship" criterion. *INS* v. *Wang*, *supra*, 450 U.S. at 144-145.

The Senate asserts (Br. 30), however, that Congress, acting through one of its Houses under Section 244(c)(2), does not review the decision of the Attorney General to grant suspension of deportation, but instead simply "exercises its own judgment whether permanent residence should be granted" in the particular case. See also House Br. 30-31. But such an ad hoc and largely standardless system of denying relief by means of the passage of congressional resolutions pursuant to a statute that remains unchanged in its general applicability undermines the "government of laws" the Framers intended and creates the instability and mutable rules that Madison warned would "poison[] the blessings of liberty itself" (*The Federalist* No. 62, *supra*, at 421). It also could lead to the loss of public confidence in and respect for the Government that Madison anticipated would result in the absence of the checks on legislative power that the Framers had fashioned (*id.* at 422).

Finally, the passage of a resolution by one or both Houses of Congress purporting to set aside an order issued by an Executive official after following statutorily prescribed procedures, and requiring a different disposition of the matter, plainly encroaches upon the independence and integrity of the President or other Officer of the United States charged with administering the statute in question. As the court of appeals observed, the Executive's decision in this case "was a reasoned one, rendered under the law," carrying with it "all the weight and dignity that necessarily attends deliberative decisions by one of the highest officers in the Executive branch" (J.S. App. 53a). "Summary reversal of the Executive's decision by the Legislative Branch in a single case," without amendment of the general standards in the governing act or even the passage of a law creating an exception to those standards, "detracts from the authority of the second branch, and to that extent undermines its powers" (*id.* at 53a-54a). As noted above, the Presentation Clauses were designed to ensure

a measure of protection against such aggrandizement of the Legislative Branch at the expense of the dignity and authority of a co-equal Branch.

Thus, the intent of the Framers underlying the constitutional provisions at issue confirm what is manifest from the text of the Constitution itself: Congress cannot exercise its legislative powers through one or both of its Houses by means of a legislative veto of Executive decisions. By incorporating the principles of bicameralism and Presidential review of the exercise of the legislative power into the *Constitution*, the Framers intended to erect formidable and enduring checks against improvident legislative action and congressional encroachment upon the Executive. Such fundamental protections cannot be waived or dispensed with by mere *legislation* passed by the very branch of government whose powers were sought to be restrained. See *Marbury* v. *Madison*, *supra*, 5 U.S. (1 Cranch) at 176. Otherwise, these safeguards would be lost, perhaps permanently, whenever Congress was able to muster two-thirds of each House to override a Presidential veto of the legislation authorizing one or both Houses to adopt measures having the force of a law or whenever the President, because of the exigencies of the moment, felt compelled to approve such authorizing legislation. See, *e.g.*, Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1357 (1953); cf. *United States* v. *Lovett*, 328 U.S. 303, 313 (1946).[19]

4. The Unconstitutionality of Section 244(c)(2) is Further Supported by the Fact That When the Framers Intended to Permit a Departure From the Requirements of Bicameral Action and Presentation to the President, They Expressly So Provided

The conclusion drawn from the text and debates surrounding the adoption of the Constitution—that concur-

[19] On a number of occasions a President has felt compelled to approve a bill containing a legislative veto provision. See, *e.g.*, Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. Rev. 423, 429 & n.23 (1978).

rence by both Houses of Congress and presentation to the President is required with respect to all exercises by Congress of its legislative powers under Article I—is further reinforced by the fact that, in other situations where the Framers intended a departure from those requirements, they expressly so provided. Examples are contained in both Article I and Article II of the Constitution.

Of particular significance is the Treaty Clause in Article II, Section 2. That Clause permits the President, by and with the advice and consent of the Senate, to conclude a treaty without any participation by the House of Representatives.[20] A treaty, of course, has the force and effect of law.[21] This express grant of power to the Senate to participate in "lawmaking" without involvement of the House of Representatives strongly indicates that, in the case of all other measures having the effect of a law—*i.e.*, all exercises of the "legislative Powers" conferred on Congress by Article I—concurrence of the two Houses and presentation to the President is required.[22] Indeed,

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[20] The Framers required the advice and consent of the Senate alone because the smaller number of Senators would be more conducive to the secrecy required in the conduct of the Nation's foreign affairs (*The Federalist* No. 64 (J. Jay), at 434-435) and because the longer term served by Senators would enable them "to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them" (*id.* at 434). See also *The Federalist* No. 75 (A. Hamilton), at 506-507.

[21] Treaties, like duly enacted laws, are "the supreme Law of the Land" (Art. VI, cl. 2). See, *e.g.*, *Missouri* v. *Holland*, 252 U.S. 416 (1920); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889).

[22] Although the check on improvident action afforded by bicameral consideration is not available in the case of treaties, the Framers adopted an *alternative* check in the treaty process—the requirement in Article II, Section 2, that two-thirds of the Senators present concur in the Senate's consent to a treaty, rather than the simple majority required for the passage of legislation. *The Federalist* No. 64 (J. Jay), at 438; *The Federalist* No. 66 (A. Hamilton), at 450; *The Federalist* No. 75 (A. Hamilton), at 507-509.

the requirement that the Senate consent to a proposed treaty, like the requirement in Article II, Section 2 that the Senate consent to the President's appointment of Officers of the United States,[23] is a form of one-House legislative "veto" over actions initiated by the President. The Framers' express provision for the exercise of such a veto power in certain circumstances suggests that the power cannot be exercised in other, unspecified circumstances.

This conclusion also is supported by reference to the circumstances in Article I itself in which the Framers provided for a departure from the bicameralism or presentation requirement. As in the case of treaties and appointments, addressed in Article II (see notes 20 & 22 *supra*), each such departure in Article I is readily explained by special circumstances that were determined by the Framers to make participation by the other House or review by the President inappropriate. And of special significance, none of these departures involves the exercise of the "legislative Powers" conferred on Congress by Article I—*i.e.*, actions that establish or alter the rights, duties or liabilities of persons outside the Legislative Branch.

Thus, Section 5 of Article I provides that each House shall be the judge of the election and qualifications of its own Members and shall keep a journal of its own proceedings. The same Section authorizes each House to determine the rules of its proceedings, compel the attendance of absent Members, punish its Members for disorderly behavior, and (with the concurrence of two-thirds) expel a Member. None of these authorizations involves the exercise of legislative powers; rather, all are essen-

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[23] The House of Representatives was excluded from the appointment process because the number of Members in that Body and its more fluctuating membership would defeat the stability of that process and the administration of the laws. *The Federalist* No. 77 (A. Hamilton), at 519. It also was thought that "infinite delays and embarassments" might be occasioned by requiring the concurrence of the House of Representatives (*ibid.*).

tially internal matters for each House and are necessary incidents to the independence of each. For these reasons, they do not require the concurrence of the other House or, consequently, presentation to the President under Section 7, Clause 3, of Article I. Of a similar nature are the provisions for each House to choose its own officers (Art. I, § 2, cl. 5; Art. I, § 3, cl. 5). See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 127-128; I J. Story, *supra* § 687, at 475-486; *id.* § 741, at 517.

The House of Representatives and Senate also are granted, respectively, the sole power of impeachment and of trying impeachments (Art. I, § 2, cl. 5; Art. I, § 3, cls. 6 and 7). Although the exercise of these powers obviously affects persons outside the Legislative Branch, the powers are of a judicial rather than legislative nature (see *Kilbourn* v. *Thompson*, 103 U.S. 168, 191 (1880); *The Federalist* No. 65 (A. Hamilton)), their impact is limited to persons occupying positions in the government, and the consequences of conviction include only removal of the official from office and his disqualification from holding any federal office thereafter (Art. I, § 3, cl. 7). Furthermore, the Constitution expressly forecloses any negative by the President in the impeachment process by providing in Article II, Section 2, Clause 1, that the President's power to grant reprieves and pardons for offenses against the United States does not apply "in Cases of Impeachment."[24] The Framers adopted an alternative protection against arbitrary action in cases of impeachment, however, by requiring the concurrence of two-thirds of the Senators present for a conviction. *The Federalist* No. 66, *supra*, at 466.[25]

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[24] This foreclosure was thought necessary in order to guard against the possibility that the President would shelter his adherents (who often might hold an office in the government) from the effects of impeachment and conviction or might himself be involved in the offense giving rise to impeachment. *The Federalist* No. 69 (A. Hamilton), at 466.

[25] Each House also has the implied authority under Article I to initiate investigations into areas of possible legislation and to compel the production of information for that purpose. See, *e.g.*,

The only occasion, aside from the passage of a law, on which Article I requires the concurrence of both Houses is when one House seeks to adjourn for more than three days or to another place (Art. I, § 5, cl. 4). But a concurrent resolution pertaining to adjournment is expressly excepted from the requirement in Article I, Section 7, Clause 3, that any resolution or vote requiring the concurrence of the House and Senate be presented to the President. This exception serves to ensure a measure of protection for the independence of the Legislative Branch in its deliberations (see I J. Story, *supra*, §§ 843-844, at 582-583), and, in any event, adjournment does not constitute the exercise of legislative power having a legal effect on persons outside that Branch, whose interests might be protected through the President's veto power.[26] It is significant, though, that even with respect to the adjournment of Congress, the Constitution provides an alternative means of participation by the President in appropriate circumstances. Art. II, § 3.[27]

Eastland v. *United States Servicemen's Fund*, 421 U.S. 491, 504-507 (1975). But this power of investigation may be exercised only in aid of possible future legislation; it does not encompass a "'"general" power to inquire into private affairs.'" *Id.* at 504 n.15, quoting *McGrain* v. *Daugherty*, 273 U.S. 135, 173 (1927).

[26] The Court also has held that a resolution proposing an amendment to the Constitution, passed as required by two-thirds of each House (Art. V), need not be presented to the President for his approval or disapproval. *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798). But the proposing of constitutional amendments is not an exercise of legislative power under Article I (*id.* at 381 n.*; Chase, J.), to which the Presentation Clauses apply. Moreover, the requirement that a constitutional amendment command the vote of two-thirds of each House provides a degree of protection against encroachment upon the Executive and improvident measures that is substantially equivalent to that in the Presentation Clauses, which permit a veto by the President to be overridden by a like vote. The requirement of ratification by three-fourths of the States, of course, provides even greater protection.

[27] Section 3 of Article II provides that the President "may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper."

In short, the Constitution prescribes the means by which Congress' "legislative Powers" may be exercised: concurrence of both Houses and the President, or by a two-thirds majority of both Houses. Exceptions to these principles were provided in other circumstances only in response to the clearly expressed or manifest exigencies of the particular function involved (see pages 35-38 & notes 20, 22-26 *supra*). Moreover, when they departed from the general constitutional norm of bicameral action and Presidential review, the Framers were careful to furnish, where feasible, an alternative means of protection against arbitrary action by the Legislative Branch, such as a provision for action by two-thirds of the particular House concerned. In view of this meticulous attention to the system of checks upon the Legislative Branch that pervades the text of the Constitution (as well as the debates surrounding its adoption), accepted principles of construction compel the conclusion that Congress may not dispense with the requirements of bicameral action and Presidential review whenever the Constitution itself does not affirmatively authorize a departure from those requirements. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 127; *Nevada* v. *Hall*, 440 U.S. 410, 425 (1979); *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 182; see also *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 6, and cases cited.

No provision of the Constitution affirmatively authorizes such a departure in the case of a legislative veto of Executive actions in the administration of the laws. Moreover, the Constitution does not afford any alternative check on arbitrary legislative action in such circumstances, and there are no attributes of legislative vetoes that would make bicameral action or presentation to the President inappropriate under the system of checks and balances fashioned by the Framers. Legislative vetoes, such as those authorized by Section 244(c)(2) of the Immigration and Nationality Act, therefore are foreclosed by the Constitution.

5. *The Constitutional Requirements of Bicameralism and Presentation to the President Cannot Be Avoided by Characterizing Section 244(c)(2) as Something Other Than a Legislative Veto*

The House of Representatives contends (Br. 27-32, 39-40) that the explicit Article I requirements of bicameral action and presentation to the President applicable to all congressional measures constituting the exercise of legislative power may be avoided if only the operation of Section 244(c)(2) were to be characterized in a different way. Thus, the House argues (Br. 27-28), a resolution passed by one House of Congress pursuant to that Section is not really a constitutionally proscribed "legislative veto" of the Attorney General's determination that the alien is eligible for and deserving of relief under the Act. Rather, in the House's view, the favorable administrative action is merely a recommendation by the Attorney General that Congress grant relief (Br. 31, 39-40), after which Congress exercises "its own final and independent judgment on the matter" (Br. 28). Under the House of Representatives' characterization, even after the Attorney General makes a determination in the alien's favor and suspends his deportation, cancellation of deportation and adjustment of status are granted only when "Congress has *approved by inaction* a change in the status of the alien pursuant to Section 244(c)(2)" (Br. 31; emphasis added). The Senate makes a similar argument. Br. 29-30. There are at least three major flaws in this analysis.

First, the text of Section 244 itself refutes the House of Representatives' contention that a resolution passed pursuant to that Section is not a "legislative veto" of the Attorney General's determination that the alien is eligible for and deserving of relief. If the Attorney General makes such a determination and consequently suspends the alien's deportation, Section 244(c)(2) authorizes either House of Congress to pass a resolution "stating in substance that it does not favor the suspension of

such deportation." Thus, by the terms of the statutory authorization, such a resolution affirmatively rejects or disapproves—"vetoes"—the suspension of deportation ordered by the Attorney General in his administration of the Act. See also H.R. Rep. No. 1365, 82d Cong., 2d Sess. 62 (1952) ("adjustment of status will become final in [the] absence of adverse action by either the Senate or House of Representatives"); S. Rep. No. 1137, 82d Cong., 2d Sess. 24 (1952) (same).[28]

Second, even if the Senate and House of Representatives' strained characterization of Section 244(c)(2) were correct, which it is not, this would not aid them in evading the requirements of the Presentation Clauses. As the House of Representatives concedes (Br. 31), if Congress takes no action whatever within the period available to it following the Attorney General's order suspending deportation, deportation proceedings are cancelled, the temporary suspension of deportation becomes final, and the Attorney General then must grant the alien permanent resident status. A resolution of disapproval intervenes to prevent these events from occurring and, in addition, *requires* the Attorney General to deport the

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[28] In arguing that the Attorney General's order suspending deportation is only a recommendation subject to approval by Congress, the House relies (Br. 31) upon *Jay* v. *Boyd*, 351 U.S. 345, 351 (1956). See also Senate Br. 25 n.39. But that case discussed the suspension of deportation of aliens covered by 8 U.S.C. (1952 ed.) 1254(a)(5). The Attorney General could cancel deportation proceedings and grant permanent resident status to such an alien only if Congress took *affirmative action* by passing a concurrent resolution stating in substance that it favored the suspension of deportation; if Congress took no action, the alien had to be deported. 8 U.S.C. (1952 ed.) 1254(c); compare 8 U.S.C. 1254(a)(2) and (c)(3). The present Section 244(c)(2) works in precisely the opposite manner. The alien's deportation is cancelled and he attains permanent resident status only in the absence of action by Congress. Thus, *Jay* v. *Boyd* in no way supports the House's characterization of the statutory scheme as one under which the Attorney General merely makes a recommendation and Congress grants permanent resident status by *inaction*.

alien. See Section 244(c)(2). Thus, in whatever manner it may be described, a resolution passed by only one House of Congress pursuant to Section 244(c)(2) undeniably has a legal effect on persons outside the Legislative Branch, both by binding the Attorney General in his administration of the Immigration and Nationality Act and by affecting the legal status and liberty of the individual alien. The resolution therefore plainly is "legislative in its character and effect" (S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897); see note 4 *supra*), even if not in name. As we have explained above (see pages 24-25 *supra*), the Framers added Clause 3 to Article I, Section 7, of the Constitution for the specific purpose of preventing Congress from evading the President's constitutionally mandated participation in lawmaking by labeling a legislative act something other than a "Bill"—*e.g.*, a "Resolution." Accordingly, Congress cannot evade the explicit requirements of the Constitution here simply by characterizing the evasion in a different way and labeling the means of accomplishing it a "resolution" stating that the House concerned "does not favor" a suspension of deportation.

Finally, recognition of a power in Congress to work a change in the law as applied to a particular alien through what the House of Representatives labels (Br. 31) "approv[al] by inaction" of an Executive recommendation would constitute a radical transformation of the respective roles of the Legislative and Executive Branches in the making of laws. Article II, Section 3, of the Constitution authorizes the President to recommend to Congress such "Measures as he shall judge necessary and expedient." But those measures do not become laws unless they "shall have passed" each House of Congress (Art. I, § 7, cl. 2)—*i.e.*, unless they have received the approval of each House through affirmative action—and shall have been approved by the President or repassed over his objections. Under the Senate and House's characterization, however, the Attorney General's recommendation becomes the "law" affecting the alien (the

equivalent, as it were, of a private law granting relief) in the absence of affirmative action by either House. As the court of appeals observed, moreover, the inaction of either House could be ascribed variously to "endorsement, acquiescence, passivity, indecision, or indifference" (J.S. App. 60a)—or, we might add, to inattention or inadvertence.[29]

Thus, accepting, arguendo, the House and Senate's premise that Section 244(c)(2) is intended to permit Congress to change an alien's legal status by approving the Attorney General's recommendation through inaction, the Section necessarily is invalid because it does not require the affirmative "Concurrence" of the two Houses made "necessary" by the Constitution (Art. I, § 7, cl. 3) for the enactment of positive law. Furthermore, because under this view the Attorney General's decision would become a "law" without any action by Congress, the Executive would, in effect, make the laws, not merely recommend and later approve or disapprove them in the manner prescribed in Article II, Section 3, and the Presentation Clauses. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 123, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 587-588. Viewed in the manner the Senate and House of Representatives suggest, then, the one-House veto provision entails a reversal of the constitutionally prescribed roles of the Legislative and Executive Branches in the making of laws.

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[29] The failure of either House to adopt a resolution of disapproval also might reflect nothing more than the internal rules of each House or the strong opposition of a small minority of the House's membership. For example, in the present case, the resolution was discharged from the Judiciary Committee and brought to a vote pursuant to a unanimous consent agreement (121 Cong. Rec. 40800 (1975); J.S. App. 67a-68a), under which the objection of a single Member might well have prevented the resolution from being passed before the statutory deadline.

B. Section 244(c)(2) Violates the Constitutional Principle of Separation of Powers Because it Authorizes One House of Congress To Participate in the Execution of A Previously Enacted Law

1. *A Resolution Passed by one House of Congress That Overrules the Attorney General's Decision Under Section 244(c)(2) and Thereby Requires the Deportation of An Alien Constitutes The Execution of the Law, in Violation of the Separation of Powers*

In addition to violating the requirements in Article I of the Constitution for the making of a new law applicable to an individual alien, Section 244(c)(2) of the Immigration and Nationality Act also contravenes the constitutional doctrine of separation of powers by directly involving one House of Congress in the execution of a previously enacted law. Section 242(b) of the Act assigns to the Attorney General the administrative responsibility to commence and conclude deportation proceedings against an alien. Sections 244(a)(1) and (c)(1) grant the Attorney General the authority to determine in those proceedings whether the alien is eligible for and deserving of suspension of deportation and permanent resident status under the statutory criteria. Performance of these functions plainly constitutes the execution of the law.[30]

Section 244(c)(2) authorizes either House of Congress to overrule the Attorney General's determination that an individual alien is eligible for and deserving of suspension of deportation and permanent resident status and

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[30] The Court noted in *Buckley* v. *Valeo* that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3" (424 U.S. at 138). The authority to commence deportation proceedings and to cancel them in appropriate circumstances (see *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869)) is of a similar nature.

to require the Attorney General, instead, to deport the alien. That Section therefore vests the final decision-making authority pursuant to an Act of Congress, not in the President or the Officer of the United States appointed by him to administer that Act, but in one House of Congress itself. Indeed, the power exercised by the Senate or House of Representatives pursuant to Section 244(c)(2) is precisely the same as that which might be exercised by the President in overruling or directing the decision of a subordinate Executive Branch official in appropriate circumstances, pursuant to his constitutional responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3. Such congressional overruling of an Officer of the United States in the performance of his official duties, if not accomplished by the passage of a new law that amends the statutory provision the Officer construed and applied in reaching his decision, constitutes the execution of the law. For Congress both to make and to execute the law in this fashion would violate the most fundamental principle embodied in the Constitution: that of the separation of powers.

In *Buckley* v. *Valeo*, *supra*, 424 U.S. at 120, the Court emphasized the "intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." The Framers' intent in this regard was influenced by Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct. *Ibid.* Thus, Madison explained, quoting Montesquieu:

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the *same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."

The Federalist No. 47, *supra*, at 326 (emphasis in original). In a passage quoted by the court of appeals, Blackstone similarly noted that in such a regime, "[t]he magistrate

may enact tyrannical laws, and execute them in a tyrannical manner, *since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself.*" J.S. App. 31a, quoting 1 W. Blackstone, *Commentaries* 142-143 (1979) (emphasis added).

"The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 124. Thus, the Constitution vests "All legislative Powers" granted by the Constitution in Congress (Art. I, § 1), the "executive Power" in the President (Art. II, § 1), and the "judicial Power of the United States" in the supreme Court and in such inferior Courts as Congress may ordain and establish (Art. III, § 1). As Chief Justice Marshall observed, "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law" (*Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825)). See also *Buckley* v. *Valeo*, *supra*, 424 U.S. at 139, quoting *Springer* v. *Philippine Islands*, *supra*, 277 U.S. at 202.

In making the law, Congress may either legislate with great precision or, instead, "commit something to the discretion of the other departments." *Wayman* v. *Southard*, *supra*, 23 U.S. (10 Wheat.) at 46). But whatever the degree of specificity in the legislation, "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the *Executive* to administer the laws and for the courts to enforce them when enforcement is sought." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978) (emphasis added). When Congress has made its policy judgment by enacting a law, the legislative function comes to an end. The Constitution vests the implementation of that policy in the Executive. That concept is the essence of separation of powers. This Court, in the very cases upon which the Senate and

House of Representatives rely, has recognized that this principle applies with equal force with respect to the exclusion and expulsion of aliens. Thus, in *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893) (House Br. 35 n.28, 36, 48), the Court stated:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, *and to be executed by the executive authority according to the regulations established*, except so far as the *judicial* department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

149 U.S. at 713 (emphasis added). See also *Mahler* v. *Eby*, 264 U.S. 32, 40 (1924) (House Br. 19, 27); cf. *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 335-336 (1909) (House Br. 34; Senate Br. 31); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972) (House Br. 28, 34, 35; Senate Br. 31).

In view of the explicit distribution of powers among the three Branches, this Court observed in *Buckley* v. *Valeo* that " 'it is a breach of the National fundamental law if Congress * * * by law attempts to invest itself or its members with either executive power or judicial power.' " 424 U.S. at 121-122, quoting *Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928). That is precisely what Congress has attempted to do in Section 244(c)(2) of the Immigration and Nationality Act. As Madison explained in *The Federalist* No. 48, *supra*, at 332.

> It is agreed on all sides that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers.

See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 630 (1935). This principle is violated by Section 244(c)(2), because Congress has delegated to either of its Houses the final authority to "administer" suspensions of deportation where the Attorney General has made a determination in favor of the alien and to "overrule" the Attorney General's decision when it so desires.[31]

2. *The Unconstitutionality of Section 244(c)(2) Follows A Fortiori from This Court's Decision in* Buckley v. Valeo

The invalidity of Section 244(c)(2) on separation of powers grounds follows a fortiori from this Court's decision in *Buckley* v. *Valeo*. There, the Court held unconstitutional a statutory provision authorizing the President *pro tempore* of the Senate and the Speaker of the House of Representatives to appoint members of the Federal Election Commission. 424 U.S. at 109-141. In arriving at this conclusion, the Court extensively ex-

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[31] The only reference to the views of the Framers in the entire brief of the House of Representatives is to Madison's statement that Montesquieu's maximum regarding the separation of powers among different departments of government did not mean "that these departments ought to have no *partial agency* in, or no *controul* over the acts of the other." Br. 23, quoting *The Federalist* No. 47, *supra*, at 325 (emphasis in *The Federalist*). But the House overlooks the fact that Madison was defending the Constitution against the charge that the three branches were not *entirely* separate from each other (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 120), in view of such *express* provisions in the Constitution as those granting the House and Senate powers relating to impeachment and conferring a qualified veto power on the President (see, *e.g.*, *The Federalist* No. 47, at 325-331)—provisions that were intended to furnish a system of *checks* on the powers of the other branches. See, *e.g.*, *Buckley* v. *Valeo*, *supra*, 424 U.S. at 121; *The Federalist* No. 51 (J. Madison), at 348-350, Madison's statement does not suggest that a court may sanction other departures from the separation of powers doctrine where the Framers have not so provided, based on nothing more than the court's own assessment of whether the departures would result in only a "partial agency in, or no controul over" another Branch rather than a complete usurpation of power.

amined the doctrine of separation of powers and its particular expression in the Appointments Clause of the Constitution (Art. II, § 2, cl. 2). The Court held that any "significant governmental duty * * * pursuant to a public law" (424 U.S. at 141)—including the enforcement of the law through judicial proceedings, the promulgation of regulations, the issuance of advisory opinions interpreting the law, and the determination of the eligibility of individuals for benefits (424 U.S. at 138-141)—must be exercised by "Officers of the United States" appointed by the President or otherwise in conformity with the Appointments Clause; these duties, the Court held, cannot be carried out by officials appointed by Congress. *Ibid.*; see also *id.* at 125-126, 131; *id.* at 267-282 (opinion of White, J.).

In Section 244(c)(2), Congress has not merely authorized one of its Houses to appoint the officials who will in turn administer and enforce the law, as in the statutory provision this Court struck down in *Buckley* v. *Valeo*. Congress has taken the more extreme step of reserving such authority to the Senate and House of Representatives themselves. But as the Court explained in *Buckley*, "'[n]ot having the power of appointment, * * * the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection'" (424 U.S. at 139, quoting *Springer* v. *Philippine Islands*, *supra*, 277 U.S. at 202). It necessarily follows that Congress cannot engraft upon the offices of the Members of one of its Houses the Executive power to nullify the determination by the Attorney General that an alien is eligible for and deserving of relief under an Act of Congress and to require the Attorney General to make a different disposition of the case.[32]

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[32] Although this case involves a legislative veto of an order issued in an administrative *adjudication*, a legislative veto of an order issued in a rule-making proceeding is equally violative of the doctrine of separation of powers. The Court made clear in *Buckley* that the promulgation of regulations pursuant to a previously en-

This conclusion is strengthened by the Incompatibility Clause of the Constitution (Art I, § 6, cl. 2). See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 124. That Clause provides that "no Person holding any Office under the United States"—which includes all those who "exercis[e] significant authority pursuant to the laws of the United States" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 126)—"shall be a Member of either House during his Continuance in Office." We doubt that even the Senate and House of Representatives would deny that their Members "exercis[e] significant authority *pursuant to* the laws of the United States" when they vote on a resolution of disapproval pursuant to Section 244(c)(2) of the Immigration and Nationality Act.[33]

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acted law must be undertaken by Officers of the United States appointed by the President, not by officials appointed by Congress. 424 U.S. at 140. It necessarily follows that Congress itself cannot overrule the promulgation of a regulation by an Officer of the United States pursuant to authority granted by an Act of Congress without passing a *law* amending that Act.

Nor does Congress' inability to overrule a decision of an Officer of the United States without passing a law depend on whether that Officer may be removed by the President at will or is, instead, a member of an "independent agency" who is insulated from such removal in the absence of cause. Cf. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 132-133, 141. In either case, if Congress reserved the authority to veto decisions of the Officer, it would possess the power both to make the law and participate in its execution—the very concentration of powers the Framers sought to prevent. And, of course, compliance with the Presentation Clauses is particularly crucial with respect to congressional action having the effect of a law when it pertains to independent agencies, because the President does not have an alternative means of protecting the public interest from improvident measures by exercising control over the day-to-day affairs of those agencies.

[33] The House of Representatives (Br. 21) and Senate (Br. 28) seek to distinguish *Buckley* v. *Valeo* on the ground that it was concerned only with legislative encroachment upon the appointment power expressly conferred upon the President by the Appointments Clause. This contention misapprehends the thrust of *Buckley*. The Court viewed that Clause not as an isolated technicality that never-

"The decision in *Buckley* v. *Valeo* also forecloses the argument of the House of Representatives (Br. 34-39) and Senate (Br. 31-32) that the validity of Section 244(c)(2) is supported by Congress' plenary power over immigration and by its power under the Necessary and Proper Clause. In *Buckley*, the Court observed that "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction," and the Court saw "no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers" (424 U.S. at 132). Although Congress' power over immigration concededly is broad, it likewise is not of such a "wholly different *nature*" (emphasis added) that Congress itself may participate in the execution of

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theless had to be enforced by the courts (cf. 424 U.S. at 125-126), but as a particular manifestation of the fundamental doctrine of separation of powers woven into the Constitution (*id.* at 124-131). Indeed, the Court repeatedly linked Congress' inability to appoint Officers of the United States to perform significant duties under a law with Congress' inability to perform such functions itself. 424 U.S. at 135, 137, 139, 141. The Court held that Congress could appoint officers only in connection with the conduct of its own internal affairs (*id.* at 127-128; cf. *id.* at 133-134), in aid of its legislative function through investigation (*id.* at 137-138, 139, 141), or in the dissemination of information, removed from the administration of the laws (*id.* at 137). It is significant that the functions in connection with which Congress can appoint its own officers are those that do *not* constitute the exercise of Congress' "legislative Powers," in the sense of giving binding instructions to the Executive Branch or regulating the affairs of private persons (see pages 38-39, *supra*). To exercise such "legislative Powers," Congress must make a *law*, which would, in turn, be administered by "Officers of the United States." This demonstrates the interrelationship between the argument made in Point A that Section 244(c)(2) is invalid because it does not comport with the requirements for making a new law, and the argument herein that Section 244(c)(2) does not comport with the separation of powers doctrine as regards the execution of a previously enacted law.

laws pertaining to aliens. See also cases cited at page 47, *supra*.

Similarly, the Court observed in *Buckley* v. *Valeo* that "Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I." 424 U.S. at 135. Nor, because of the doctrine of separation of powers expressed in the Appointments Clause, could Congress vest in itself the authority to appoint Officers of the United States to serve as members of the Federal Election Commission. *Ibid.* So here, Congress cannot authorize one of its Houses to participate in the execution of the law merely because it believes that such participation would be "necessary and proper." The court of appeals made the same point, noting that the Necessary and Proper Clause "authorizes Congress to 'make all *laws*', not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional *form* in the exercise of the power" (J.S. App. 56a; emphasis added).

The Senate (Br. 28, 31, 32, 34) and House of Representatives (Br. 23, 26, 27, 33) rely extensively upon this Court's decision in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), in arguing that Section 244(c)(2) is constitutional. But that case involved a situation in which Congress, by enacting *legislation*, regulated the custody of materials in the Executive Branch and the manner in which decisions regarding those materials would be made, while assigning to an Officer of the United States appointed by the President the responsibility to administer the law. *Id.* at 441, 443-445; see *id.* at 498 (opinion of Powell, J.) ("This is not a case in which the Legislative Branch has exceeded its enumerated powers by assuming a function reserved to the Executive under Art. II"). That decision therefore is fully consistent with *Buckley* v. *Valeo* and in no way supports Congress' vesting in itself or one of its Houses the authority to veto orders or regulations issued under

an existing statute. See *id.* at 500 n.4 (opinion of Powell, J.) (noting that this issue was not before the Court).

3. *Section 244(c)(2) Cannot Be Sustained on the Novel Theory That the Executive is a Mere Agent of Congress*

Finally, the House of Representatives argues (Br. 25, 28, 32-33, 35-39) that the cancellation of deportation and granting of permanent resident status constitute the exercise of "legislative power," even when Congress has committed these functions to the Executive, and, therefore, that an Executive officer "who receives some part of the legislative power through the sweep of the Necessary and Proper Clause does not exercise that power by virtue of the Executive power to execute the laws of the United States" (Br. 37). Accordingly, the argument proceeds, Congress may retain and exercise itself a portion of this "legislative power"—here, the authority to make the final decision regarding the alien's deportation if the Attorney General rules in the alien's favor—rather than "delegating" this function to the Executive. In this view, " 'the executive officer merely acts as an agent of the legislative branch' " (Br. 37, quoting *Atkins* v. *United States*, 556 F.2d 1028, 1068 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978)), and Congress therefore may attach any conditions it wishes to a grant of authority pursuant to that agency relationship. What is more, the House makes clear (Br. 26, 37) that its argument applies to *all* assertions of legislative power, except in those limited situations in which the Executive also has inherent constitutional authority over the subject matter. This proposition, which reduces the Executive from its status as a co-equal Branch to a mere pawn of the legislature, is as erroneous as it is audacious.[34]

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[34] The Senate suggests (Br. 28-29) that Section 244(c)(2) actually augments rather than infringes upon Executive power because it grants to the Executive an ability to suspend deportations

First, contrary to the House's contention, an Officer of the Executive Branch who performs duties pursuant to an Act of Congress does not exercise "legislative power." Legislative power is the power to make laws, not to carry them into effect. This Court reaffirmed in *Buckley* that the Framers' "'vesting of the executive power in the President was essentially a grant of the power to execute the laws'" (424 U.S. at 135, quoting *Myers* v. *United States*, *supra*, 272 U.S. at 117; see also 272 U.S. at 163-164). Thus, the authority to administer the laws is granted to the Executive by the Constitution, not by Congress, although obviously the Executive power does not attach in a particular area until Congress has passed the law that the Executive will administer.

Second, the Executive is not a mere agent of the Legislative Branch, as the House of Representatives suggests; he is an agent of the *law*. The President's constitutional duty is to "take Care that the Laws be faithfully executed" (Art. II, § 3), not to execute the wishes of Con-

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that it did not possess prior to 1940. This argument misapprehends the nature of the doctrine of separation of powers. The violation of that doctrine in this case derives from the effect Section 244(c)(2) has on the manner in which the Branches exercise their respective powers, not on whether Congress has given the Executive a greater or lesser number of things to do. For example, the statutes imposing non-judicial functions on Article III courts (see *Buckley* v. *Valeo*, *supra*, 424 U.S. at 123, citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852)) were not saved from invalidity because they assigned to the Judicial Branch functions it did not previously perform. Moreover, the doctrine of separation of powers is violated in this case not only by the infringement of the Executive's powers, but also by the corresponding concentration of powers in the hands of the Legislative Branch.

The Senate suggests (Br. 30) that if the Attorney General believes that the legislative veto mechanism in Section 244(c)(2) is unconstitutional, he may simply decline to grant suspensions of deportation. We do not believe, however, that such total disregard of the evident congressional intent that relief be available in meritorious cases would be consistent with the Attorney General's obligation faithfully to administer the Act.

gress in whatever manner they may be expressed. As Hamilton wrote:

> To what purpose separate the executive, or the judiciary, from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal and incapable of producing the ends for which it was established. *It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government.*

The Federalist No. 71, *supra*, at 483 (emphasis added). The independence of the Executive from the Legislative Branch is evident as well in the Framers' provision for the selection of the President by an independent body of electors, from which Senators and Representatives are expressly excluded. Art. II, § 1, cls. 2 and 3; Twelfth Amendment; see *The Federalist* No. 51 (J. Madison), at 348; *The Federalist* No. 68, *supra*, at 457-461; see also Art. II, § 1, cl. 7.[35]

Contrary to the Senate's apparent suggestion (Br. 12 n.12), Congress can derive no support for the validity of the legislative veto from the cases sustaining the authority of Congress to make the application of a law conditional upon a finding by the Executive that the factors requisite for its application are present (see *Field* v. *Clark*, *supra*) or upon a vote by private persons expressing a desire to be covered by the statute (see, *e.g.*, *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939)). The Court in *Currin* expressly rejected the contention that the power vested in agricultural producers in a particular district to decide by referendum whether to take advantage of the protection of a federal law (just as voters in a local

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[35] Even if the Executive is viewed in some sense as an "agent" of the Legislative Branch in carrying out congressional policies, that agency relationship is one firmly established by the Constitution. Under that document, Congress may convey binding instructions to its "agent" in the Executive Branch only in the form of a duly enacted *law*.

community might elect to organize under a home rule statute passed by the state legislature) constitutes "legislative power" that the Constitution vests in Congress. The Court stated that the "'[legislative] power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of the legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.'" 306 U.S. at 16, quoting *Hampton & Co.* v. *United States, supra*, 276 U.S. at 407.[36]

C. If Section 244(c)(2) Were Held Constitutional, It Would Appear That Congress Could Pass General Legislation Authorizing One or Both of Its Houses to Veto Any Decision or Order of the President or Other Officer of the United States

Section 244(c)(2) authorizes one House of Congress to overrule an adjudicatory decision of an Officer of the Executive Branch and effectively to direct the final disposition of the matter. If that section were held to be constitutional, it would appear that Congress could pass legislation authorizing one of its Houses to veto virtually every decision or order of the President or other Officer

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[36] The statutory requirement involved in *Currin*, that a group of private persons affirmatively vote by a two-thirds majority to be covered by an Act of Congress, is no different in principle from Congress' provision in the Social Security Act that the payment of benefits is conditioned upon the individual beneficiary's filing of an application for benefits. See 42 U.S.C. 402(g)(1)(D); *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981). It does not follow from the fact that Congress may make benefits under an Act of Congress dependent upon the initiative of private persons that Congress itself may exercise the authority under that Act to determine who will and who will not receive benefits, without passing an amending law. Put another way, the fact that Congress may impose certain conditions on the receipt of benefits under a law does not suggest that Congress may impose the *unconstitutional* condition that the Executive's determination of eligibility for benefits be subject to veto by one or both Houses of Congress. See Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 596 (1953).

of the United States in the execution of a law passed by Congress. The President "might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands." *The Federalist* No. 73, *supra*, at 494. This would effectively vest the "*whole* power" of the Executive Branch in one House of the Legislative Branch, and thereby "[subvert] the fundamental principles of a free constitution" (*Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 442 n.5), quoting *The Federalist* No. 47, *supra*, at 325-326 (emphasis in original)). It would, at the same time, fundamentally alter the constitutionally prescribed means of exercising legislative power, by bringing about a wholesale evasion of the requirements of bicameral approval and presentation to the President.

Statutory provisions authorizing one House of Congress to overrule determinations made pursuant to law by those charged with administering the law are of relatively recent origin, dating principally from a provision in a reorganization statute passed in 1932 (Act of June 30, 1932, ch. 314, 47 Stat. 382). See Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. Rev. 423, 426-427 (1978). Except for a number of measures adopted during World War II, virtually all of the "legislative veto" provisions have been enacted within the last decade.[37] Such devices therefore

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[37] See H.R. Doc. No. 95-357, 95th Cong., 2d Sess. 1 (1978) (noting that at least 48 legislative veto provisions were enacted during the four years prior to 1978, more than had been enacted during the preceding 20 years); Watson, *supra*, 63 Calif. L. Rev. at 1089-1094. These provisions have been enacted despite the view of the current and previous Administrations that various forms of congressional control of executive action, short of duly enacted legislation, are unconstitutional. See Presidential statements collected at J.S. 22 n.19; Watson, *supra*, 63 Calif. L. Rev. at 988 nn. 9 & 10. The effort by the Senate (Br. 9-17, 33-34) to convey the impression of Executive acquiescence in legislative veto provisions

cannot be thought to be essential to the effective working of the form of government established by the Constitution. Indeed, the Judiciary Committees of the Senate and House of Representatives both proposed during the 96th

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therefore is clearly misleading. See also *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140 n.176.

The Senate cites (Br. 33-34) the opinion of Attorney General Bell (43 Op. Att'y Gen. No. 10 (1977)) concluding that the one-House veto provision in the reorganization statute, 5 U.S.C. 906(a), is constitutional. But that opinion emphasized that its conclusion was limited to the context of reorganization plans and did not extend, for example, to congressional vetoes of Executive actions in on-going programs, such as that involved here. 43 Op. Att'y Gen. No. 10, *supra*, at 4. Moreover, in reaching the conclusion that Congress may take action outside the normal legislative process, that opinion relied (*id.* at 2) principally on a statute passed in 1789 (Act of Sept. 2, 1789, ch. XII, Section 2, 1 Stat. 65-66) providing that either House of Congress could require the Secretary of the Treasury to make reports and furnish information. But either House of Congress would have the inherent power to require such information in appropriate circumstances without the need for an authorizing statute (see note 25 *supra*), and a resolution making such a demand therefore does not constitute the exercise of legislative powers, for which the Constitution requires the concurrence of both Houses and presentation to the President. This was the view of the Senate Judiciary Committee in its 1897 report. S. Rep. No. 1335 *supra*, at 8-9. We therefore must take a view contrary to that of Attorney General Bell, with respect to both the precedential effect of the 1789 statute (see also Watson *supra*, 63 Calif. L. Rev. at 997 n.49) and the validity of the legislative veto device even in the limited context of reorganization plans. Compare 37 Op. Att'y Gen. 56, 63-64 (1933); 83 Cong. Rec. 4487 (1938).

The opinion of Attorney General Cushing (6 Op. Att'y Gen. 680, 683 (1854)), also cited by the Senate (Br. 33 n.53), likewise referred only to the 1789 statute authorizing either House to require the Secretary of the Treasury to furnish information, and noted that "in practice, the same duty is imposed on other Heads of Department" (6 Op. Att'y Gen. *supra*, at 683). Finally, the 1949 Department of Justice memorandum on a legislative veto device, cited by the Senate (Br. 33), also arose in the particular context of a proposed reorganization act. The memorandum characterized the provision as being in the nature of a contract between the President and Congress under which the President personally undertook to put no reorganization plan into effect if Congress disapproved it. S. Rep. No. 232, 81st Cong., 1st Sess. 20 (1949); see Watson, *supra*, 63 Calif. L. Rev. at 1014 n.143.

Congress that the legislative veto provision in Section 244(c)(2) be repealed. See pages 64-65 *infra*.

Congress has ample other means at its disposal by which it can control the actions of the Executive Branch. It can enact detailed statutory criteria to be applied by the Executive. It can repeal or amend a law when it believes the Executive has interpreted it improperly, or limit "the duration of laws so as to require renewal instead of repeal" (2 M. Farrand, *supra*, at 587 (remarks of James Madison)). Indeed, the Constitution itself contains a model for such a limitation. See Art. I, § 8, cl. 12 (no appropriation of money to raise and support Armies "shall be for a longer Term than two Years"). Congress or one of its Houses also can pass a resolution expressing its views on matters within the Executive's domain, which, in appropriate circumstances, no doubt would carry significant political, although not binding legal, force. Jackson, *supra*, 66 Harv. L. Rev. at 1355. Congressional oversight through hearings and investigations can have a similar effect.

Congress might well find it more expeditious in certain circumstances to exert its will on the people by some means other than the enactment of laws. The Framers anticipated and accepted, however, that the constitutional requirements that proposed legislation receive the concurrence of both Houses and be presented to the President for his approval or disapproval might prove inconvenient on occasion. Madison foresaw with respect to bicameralism, for example, that "as the facility and excess of lawmaking seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice than it appears to many in contemplation." *The Federalist* No. 62, *supra*, at 47. And at all events, as Justice Brandeis observed in his dissenting opinion in *Myers* v. *United States*, *supra*, "the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable

friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." 272 U.S. at 293.

D. The One-House Veto Provision in Section 244(c)(2) Is Severable From the Remainder of Section 244

If the Court holds unconstitutional the one-House veto provision in Section 244(c)(2), that provision properly may be severed from the remainder of Section 244.[38]

It is firmly established that, in the absence of compelling evidence to the contrary, the Court will presume that Congress intends the unconstitutional portion of a statute to be severed from the remainder. " 'The cardinal principle of statutory construction is to save and not to destroy'." *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). The invalid portions of a statute are to be severed " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not' " (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 108, quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

Moreover, the Immigration and Nationality Act contains a "strong severability clause" (*Califano* v. *Westcott*, 443 U.S. 76, 90 & n.8 (1979)). Section 406 of the Act, 8 U.S.C. 1101 note, provides:

> If any particular provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the applica-

[38] The question of severability is, of course, one of statutory interpretation. A finding of severability in this case therefore will not control the interpretation of the other statutes containing legislative veto provisions cited by the Senate. Br. 33 n.52, 39-48. And because of the severability issue turns on *congressional* intent, a holding that the legislative veto provision in Section 244(c)(2) is severable quite clearly would not authorize the Executive to "execute a law by disobeying it," as the House suggests (Br. 25), or "create an imperial Executive, possessing absolute and uncontrollable power to execute congressional laws as it sees fit" (*ibid.*).

tion of such provisions to other persons or circumstances shall not be affected thereby.

This clause greatly enhances the presumption of severability. See, *e.g.*, *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938).

The House and Senate appear to argue that this presumption is overcome here because Congress consistently has incorporated some form of legislative veto provision into the grant of authority to the Executive Branch to suspend deportations.[39] But the mere fact that Congress

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[39] The House and Senate also suggest that Section 244 is so "tightly integrated" (House Br. 49; see Senate Br. 24-25) that the legislative veto provision cannot be excised without impermissibly distorting the legislative scheme. See, *e.g.*, *Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973). This suggestion is plainly incorrect. In the first place, this argument is dependent upon the fiction advanced by the House and Senate that Congress affirmatively *approves* suspensions of deportation under Section 244(c)(2) by *inaction* (see House Br. 49; Senate Br. 24-25 & n.39). We have explained above why this characterization of the statutory scheme is erroneous. See pages 40-44, *supra*. Moreover, if resolutions passed by a single House are held by this Court to lack binding effect, the administrative mechanism of Section 244 will be "fully operative as a law" (*Champlin Refining Co.* v. *Corporation Commission*, *supra*, 286 U.S. at 234); indeed, it will function in precisely the way it has functioned until now in the overwhelming majority of cases (see pages 62 and 64, *infra*)—those in which neither House of Congress has passed a resolution disapproving the suspension. Thus, if the one-House veto device in Section 244(c)(2) is held invalid, suspensions would continue to be reported to Congress, pursuant to Section 244(c)(1), and deportation proceedings would be cancelled when the period specified in Section 244(c)(2) expires. During the period the report was before Congress (and later), Congress would retain the power to pass a *law*, in accordance with the requirements of Article I, requiring the alien's deportation, subject to whatever restraints may be imposed by the Bill of Attainder Clause, Art. I, § 9.

Nor is it significant that the legislative veto provision is contained in Section 244(c)(2) instead of in an independent Section or Subsection (see House Br. 49; Seniate Br. 24-25). The severability clause of the Act does not refer to "sections" or "subsections"; it refers to the excision only of "any particular *provision*" or, in-

included the unconstitutional legislative veto device in the statute obviously does not resolve the question of severability; if it did, no unconstitutional provision ever would be severed. The question of severability depends on what Congress *would* have done *if* it had recognized that legislative veto provisions are unconstitutional and therefore could not properly be included in the statute. See *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). Specifically, the question is whether, in those circumstances, Congress would have chosen to grant administrative authority to the Attorney General to suspend deportations, or instead would have chosen to deal with each individual case by considering a private bill. The House and Senate identify nothing in the legislative history suggesting that Congress would have preferred the latter course. To the contrary, the legislative history of Section 244(c)(2) reflects a deliberate decision by Congress to *reject* private bills as a means of granting relief to deportable aliens covered by that Section.

Congress first authorized the Secretary of Labor to suspend deportations in the Alien Registration Act of 1940, ch. 439, Section 20, 54 Stat. 671. That Act specified that an alien was nonetheless to be deported if both Houses of Congress, by concurrent resolution, disapproved the suspension. Between 1940 and 1948, over 23,000 deportations were suspended (see S. Rep. No. 1515, 81st Cong., 2d Sess. 599 (1950)), and apparently none was disapproved by concurrent resolution (see S. Rep. No. 1204, 80th Cong., 2d Sess. 3 (1948)).

In 1948, Congress amended the law to provide that a suspension of deportation would not take effect unless both Houses of Congress affirmatively voted by concurrent resolution to approve it. Act of July 1, 1948, ch. 783, 62 Stat. 1206. This requirement of affirmative approval by both Houses was, of course, essentially as burdensome for Congress as a regime under which

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deed, of "any * * * *application* [of a provision] to any person or circumstance * * *" (emphasis added) that is held unconstitutional.

Congress would have to pass private bills in order to grant relief.

Within months, this new system proved unacceptable. Accordingly, in 1949, the House Judiciary Committee proposed the measure that ultimately was enacted as the one-House veto provision in Section 244(c)(2). The Committee explained that it was specifically rejecting the approach adopted in the 1948 Act (H.R. Rep. No. 362, 81st Cong., 1st Sess. 2 (1949)):

> In the light of experience of the last several months, the committee came to the conclusion that the requirement of affirmative action by both Houses of the Congress in many thousands of individual cases which are submitted by the Attorney General every year, is not workable and places upon the Congress and particularly on the Committee on the Judiciary responsibilities which it cannot assume. The new responsibilities placed upon the Committee on the Judiciary under the [1948 amendment] are of purely administrative nature and they seriously interfere with the legislative work of the Committee on the Judiciary and would, in time, interfere with the legislative work of the House.

The committee's proposal was incorporated into the comprehensive reform of the immigration laws that was then underway and that culminated in the Immigration and Nationality Act of 1952. See S. Rep. No. 1515, *supra*, at 1, 609-611.

Thus, in enacting the legislative veto provision that came to be included in Section 244(c)(2), Congress not only explicitly rejected a system comparable to that of relying on private bills; it chose instead an approach that it knew from its earlier experience between 1940 and 1948 would result in the Executive Branch's suspension of deportation becoming final in all but exceptional cases. See, *e.g.*, S. Rep. No. 1204, *supra*, at 3-4. Consequently, there is no basis for concluding that, if a legislative veto provision had been unavailable, the Congress that enacted Section 244(c)(2) would have chosen to rely on private bills instead of allowing the Executive to suspend and

cancel deportations and grant permanent resident status. This conclusion is especially compelling when that Section is contrasted to Section 244(c)(3), under which Congress has retained affirmative control over cancellation of deportation and the granting of permanent resident status by requiring the approval of both Houses of Congress by concurrent resolution.

Moreover, since 1953, the Attorney General has suspended deportation in well over 5,700 cases, and the suspension has been disapproved by one House of Congress in only 229 instances (Senate Br. 20 n.34, 40). Since 1977, over 1200 deportations have been suspended, and only two of those were disapproved (Senate Br. 49). This experience strongly suggests that Congress, if it were unable to resort to the legislative veto option, would choose to enact private bills in the small percentage of cases in which it disagreed with the Attorney General's decision, rather than in the overwhelming number of cases in which it did not disagree. Indeed, in 1980, as part of a series of amendments to the immigration laws, both the Senate and House Judiciary Committees reported bills that would have repealed the legislative veto provision of Section 244(c)(2). S. Rep. No. 96-859, 96th Cong., 2d Sess. 15, 30 (1980); H.R. Rep. No. 96-1301, 96th Cong., 2d Sess. 32, 78 (1980). The House Committee explained (H.R. Rep. No. 96-1301, *supra*, at 32):

> The principal purpose of this amendment is to reduce INS paperwork. * * * Further, it will relieve Congress of the burden of reviewing sketchy and inadequate reports on suspension cases and processing legislation to approve or disapprove them. It should be noted that the cases have already been adjudicated by Immigration Judges and in some cases the Board of Immigration Appeals, following a review of the entire record of these cases.

While these proposals did not come to a vote on the floor (see 126 Cong. Rec. H11422 (daily ed. Dec. 1, 1980))—perhaps because Congress was aware that this litigation was pending (see H.R. Rep. No. 96-1301, *supra*, at 32)—nothing in their history suggests that Congress was op-

posed to the views of its committees having jurisdiction over immigration matters, much less that it would have preferred instead to *abolish* the administrative mechanism that has afforded relief to hundreds of aliens each year and revert to a regime under which relief could be granted only by private bill.

II. THE SENATE AND HOUSE OF REPRESENTATIVES' JURISDICTIONAL AND RELATED ARGUMENTS FOR AVOIDING A DECISION ON THE CONSTITUTIONAL ISSUE ARE WITHOUT MERIT

The Senate and House of Representatives have spread before the Court a plethora of jurisdictional and other issues that they assert would avoid a decision of the one-House veto question. None of these points is correct or should be permitted to divert the Court's attention from the merits of the important separation of powers issue that is properly presented in this case and ripe for resolution.

A. The Court Of Appeals Had Jurisdiction Of The Case Under Section 106(a) Of The Act

The House of Representatives (Br. 42-44) and Senate (Br. 21-23) contend that the court of appeals did not have statutory jurisdiction on Chadha's petition for review under Section 106(a) of the Act to consider his constitutional challenge to the one-House veto provision in Section 244(c)(2). This contention is without merit, because the validity of Chadha's order of deportation was entirely dependent on the constitutionality of the one-House veto.

1. *Chadha Challenged A Final Order Of Deportation Entered In A Deportation Proceeding Under Section 242(b) Of The Act*

a. The record makes clear that the final order of deportation was entered against Chadha at the conclusion of the administrative deportation proceedings pursuant to Section 242(b) of the Act *solely* because of the resolu-

tion of disapproval passed by the House of Representatives, and pursuant to the statutory command that the Attorney General "shall" deport the alien upon the passage of such a resolution (J.S. App. 70a-71a; J.A. 50-53; see pages 5-6 *supra*). In the court of appeals, Chadha challenged the validity of the final order of deportation on the ground that the statutory provision (Section 244 (c) (2)) that mandated its entry is unconstitutional. Such an action plainly is encompassed by the terms of Section 106(a), which grants exclusive jurisdiction to the courts of appeals of actions seeking "judicial review of final orders of deportation * * * made against aliens within the United States pursuant to administrative proceedings under [Section 242(b)]."

b. The Court's decision in *Foti* v. *INS*, 375 U.S. 217 (1963), also compels this conclusion. In *Foti*, the Court held that the courts of appeals have exclusive jurisdiction under Section 106(a) to review an order by the special inquiry officer (the immigration judge) denying an alien's application for suspension of deportation. There, as here, governing regulations provided for the consideration of applications for suspension of deportation together with questions of deportability in a single proceeding under Section 242(b), "resulting in one final order of deportation" (375 U.S. at 223). The Court observed that Congress was aware of this practice and had it in mind when it enacted Section 106(a). 375 U.S. at 223-224. The Court also reasoned that permitting review of a denial of suspension of deportation in a proceeding under Section 106(a) is consistent with the "plain objective" of that Section " 'to create a single, separate, statutory form of judicial review of administrative orders for the deportation . . . of aliens.' " (375 U.S. at 225, quoting H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22 (1961)). In contrast, the Court concluded, this purpose would be frustrated by a bifurcated procedure resulting from the alien's seeking review of the adjudication of his deportability in the court of appeals and review of a denial of suspension of deportation in a separate proceeding in the

district court (375 U.S. at 225-227, 232). This reasoning applies with equal force here.

The House of Representatives argues (Br. 42-43), however, that the court of appeals did not have jurisdiction under Section 106(a) because Chadha conceded his deportability. From this, the House asserts (Br. 42) that "[t]he validity or propriety of Chadha's deportation order has never been in issue" and "was in no way dependent upon or related to the House resolution under Section 244(c)(2) disapproving a cancellation of that deportation order." The House's argument confuses a finding of deportability with a lawful order of deportation. Although Chadha does not challenge the immigration judge's finding that he was deportable for overstaying his visa, he manifestly does challenge the validity of the order requiring him to be deported from the United States. The Court in *Foti* made clear that the court of of appeals' jurisdiction on a petition for review is not limited to questions of deportability,[40] as the House suggests, but rather encompasses as well the denial of a suspension of deportation that is merged into the deportation order. 375 U.S. at 227-228.

c. For similar reasons, the House also errs in relying (Br. 43) on this Court's decision in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968). In that case, after an order of deportation was entered against the alien by the special inquiry officer in deportation proceedings under Section 242(b), the alien applied to the District Director for a stay of the execution of that order pursuant to regulations authorizing the Director to grant such a stay to an alien "under a final administrative order of deportation" (392 U.S. at 209). When the application was denied, the alien sought review in the court of appeals.

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[40] The fact that Chadha conceded his deportability does not distinguish this case from *Foti*. The alien in *Foti* also conceded his deportability (375 U.S. at 218, 220), as did 80% of all aliens at the time (*id.* at 227 n.13).

This Court held that the court of appeals did not have jurisdiction under Section 106(a) to review the District Director's denial of a stay.

This case presents a materially different situation. As the Court observed in *Cheng Fan Kwok*, the application for a stay of deportation in that case "assumed the prior existence of an order of deportation," and the alien therefore "did not 'attack the deportation order itself but instead [sought] relief [*i.e.*, a stay of the execution of the order] not inconsistent with it' " (392 U.S. at 213, quoting *Mui* v. *Esperdy*, 371 F.2d 772, 777 (2d Cir. 1966)). In the present case, in contrast, Chadha's application for suspension of deportation preceded in time—and therefore did not "assume[] the prior existence of"—the order of deportation. Here, unlike the alien in *Cheng Fan Kwok*, Chadha *does* attack the deportation order itself. And the relief he seeks—cancellation of deportation—is wholly inconsistent with the existence of a valid deportation order: as the Court observed in *Foti*, "[s]ignificantly, when suspension is granted, no deportation order is rendered at all, even if the alien is in fact found to be deportable" (375 U.S. at 223). Finally, here, as in *Foti*, the order denying suspension and requiring Chadha's deportation was entered by the immigration judge responsible for conducting the administrative deportation proceedings under Section 242(b) of the Act, to which Section 106(a) expressly refers. See also *Giova* v. *Rosenberg*, 379 U.S. 18 (1964). The order denying the stay of deportation in *Cheng Fan Kwok*, on the other hand, was made "in proceedings entirely distinct from those conducted under § 242(b), by an officer [the District Director] other than the special inquiry officer who, as required by § 242(b), presided over the deportation proceeding" (392 U.S. at 213).[41]

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[41] Thus, as two commentators have observed, this Court's decisions in *Foti* and *Cheng Fan Kwok* have drawn "a bright line between decisions of immigration judges, reviewable only by courts of appeals, and decisions of district directors, reviewable only by

2. *Cases Raising Constitutional Issues Are Not Excepted From The "Exclusive" Jurisdiction Of The Courts of Appeals Under Section 106(a)*

a. The Senate contends (Br. 21-22), however, that jurisdiction under Section 106(a) does not encompass petitions seeking review of deportation orders on constitutional grounds and that Chadha therefore should have brought his constitutional challenge in the district court. See also House Br. 44. This contention is inconsistent with the plain language of Section 106(a), which provides that a petition for review in the court of appeals is the "*exclusive* procedure for judicial review of final orders of deportation" (emphasis added). Cf. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 588-589 (1980). Nothing in the legislative history of Section 106(a) suggests that its all-inclusive language does not mean exactly what it says. To the contrary, the result urged by the Senate, under which non-constitutional challenges to a deportation order would be brought in the court of appeals and constitutional challenges to the same order

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district courts." Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 35 (1975). Under this test, the court of appeals clearly had jurisdiction in this case.

The Senate suggests (Br. 21) that the court of appeals did not have jurisdiction because congressional review takes place outside of the administrative proceedings under Section 242(b). But Chadha does not take issue with the House's expression of disapproval, standing alone. Rather, he challenges the order of deportation that was required by Section 244(c)(2) to be entered in the Section 242(b) proceedings in response to the House resolution. For purposes of jurisdiction under Section 106(a), it does not matter whether the immigration judge concluded that suspension of deportation must be denied because the alien did not satisfy the statutory eligibility criteria, as in *Foti*, or because of the one-House veto, as here. Cf. *Unification Church* v. *Attorney General*, 581 F.2d 870, 877 (D.C. Cir.), cert. denied, 439 U.S. 828 (1978). Moreover, in either event, the courts of appeals have jurisdiction to consider "all determinations made during *and incident to* the administrative proceeding" under Section 242(b)." *Foti* v. *INS*, *supra*, 375 U.S. at 229 (emphasis added).

would be brought in a separate proceeding in the district court, would lead to the very bifurcation of review, proliferation of litigation, and delay in the deportation process that Congress sought to avoid in creating " 'a single, separate, statutory form of judicial review' " in the court of appeals. *Foti* v. *INS*, *supra*, 375 U.S. at 225, quoting H.R. Rep. No. 1086, *supra*, at 22; cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980).[42] Indeed, the aliens whose repetitive litigation was cited in the legislative history[43] as the most notorious examples of the particular practices Congress sought to curb had raised constitutional challenges to the Act and procedures followed under it (see *Marcello* v. *Bonds*, 349 U.S. 302, 304 (1955); *Heikkila* v. *Barber*, 345 U.S. 229, 230 (1953); see also *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50 (1955)), and the House report specifically referred to suits presenting "attacks upon the constitutionality of the Immigration and Nationality Act" (H.R. Rep. No. 1086, *supra*, at 23) as being among the proliferation of suits that were to be concentrated in the courts of appeals.

The leading commentators agree that Congress did not intend implicitly to except constitutional challenges to deportation orders from the "exclusive" grant of jurisdiction to the courts of appeals under Section 106(a). See 2 C. Gordon & H. Rosenfield, *Immigration Law and*

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[42] The Senate (Br. 22-23) and House of Representatives (Br. 43 n.32) suggest that it is inappropriate for a court of appeals to consider constitutional questions on a petition for review because the administrative record might not be framed to that end. This argument is particularly misplaced in this case, for no party has suggested that additional evidence is required in order to resolve the constitutional issues presented. In other cases under Section 106(a) raising constitutional issues, if the record does not contain sufficient evidence on which to resolve the constitutional issue, the court of appeals could remand to the immigration judge to receive additional evidence. 28 U.S.C. 2347(c); *FTC* v. *Standard Oil Co.*, *supra*, 449 U.S. at 244-245.

[43] H.R. Rep. No. 423, 86th Cong., 1st Sess. 9 (1959); H.R. Rep No. 565, 87th Cong., 1st Sess. 11 (1961); H.R. Rep. No. 1086, *supra*, at 32-33.

Procedure § 8.9Ab, at 8-74 (rev. ed. 1981) ("review by the Court of Appeals under [Section 106(a)] includes consideration of any constitutional challenges which would void the deportation order"). See also *Unification Church* v. *Attorney General*, 581 F.2d 870, 877 (D.C. Cir.), cert. denied, 439 U.S. 828 (1978); *Pilapil* v. *INS*, 424 F.2d 6 (10th Cir.), cert. denied, 400 U.S. 908 (1970); *Riva* v. *Attorney General*, 377 F. Supp. 1286 (D.D.C. 1974) (three-judge court). This result also is consistent with the practice of considering constitutional claims under other statutes providing for direct review in the courts of appeals. See, *e.g.*, *CBS* v. *FCC*, No. 80-207 (July 1, 1981), slip op. 7, 24-27; *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442 (1977).

b. The only support the House and Senate have been able to muster for the contrary position is language in the Third Circuit's recent decision in *Dastmalchi* v. *INS*, 660 F.2d 880 (1981). The Third Circuit reached the correct result in *Dastmalchi*, but for the wrong reason. Disagreeing with the reasoning of the Ninth Circuit in the decision below, the Third Circuit concluded that it was without jurisdiction on a petition for review of a deportation order under Section 106(a) to consider constitutional challenges to an INS regulation that the court erroneously believed underlay the deportation order.[44]

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[44] In *Dastmalchi*, Iranian aliens who had entered the United States on non-immigrant student visas challenged an INS regulation (8 C.F.R. 214.5) that required them to report to the District Director of INS during the Iranian crisis. They also challenged discretionary decisions of the District Director, after they reported as required, declining to overlook assertedly "minor" or "technical" violations of their student status and to restore them to lawful student status. Implementation of the reporting requirement and the District Director's decisions challenged in *Dastmalchi* occurred entirely outside of the administrative deportation proceedings under Section 242(b). The final order of deportation was entered on the basis of the evidence of deportability adduced at the Section 242(b) hearing itself; contrary to the Third Circuit's apparent assumption, the validity of that order therefore was unaffected by whether the aliens should have been required to report to the District Director under the challenged regulation or

In the court's view, because an immigration judge does not rule on the constitutionality of statutes and regulations in the course of administrative proceedings under Section 242(b), a court should not do so on a petition for review under Section 106(a). 660 F.2d at 886-890. However, this Court has rejected the argument that a special statutory provision for judicial review of agency decisions is inapplicable in the case of a constitutional challenge to the governing statute or regulations, even though that challenge would not be considered at the administrative level. See *Weinberger* v. *Salfi*, 422 U.S. 749, 760-762, 764 (1975); cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 329-330 (1976). And as we have explained above, the plain language and legislative history of Section 106(a) clearly refute the Third Circuit's statutory construction.

c. Even if the Court were to conclude, contrary to our submission above, that the court of appeals did not have jurisdiction under Section 106(a), this Court nevertheless is free to decide the constitutional question presented by the one-House veto on the INS's appeal under 28 U.S.C. 1252 in No. 80-1832. See note 1 *supra*. There is no reason for the Court to refrain from doing so and instead to remit Chadha to an action in the district court. The constitutional issue is one of continuing and fundamental importance and presents solely a question of law that has been fully addressed by the court below and by the parties in this Court.

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should have been granted discretionary relief before deportation proceedings were commenced (cf. 660 F.2d at 890 n.24). Moreover, the challenged discretionary decisions were those of the District Director, as in *Cheng Fan Kwok*, not orders of the immigration judge, as in *Foti* and the instant case. For these reasons, the aliens should have brought their challenge in the district court, as other Iranian aliens did. See *Narenji* v. *Civiletti*, 481 F. Supp. 1132 (D.D.C. 1979), rev'd, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980).

B. There Has Been No Absence of a Case or Controversy Because of a Supposed Lack of Adverseness

The House of Representatives argues (Br. 46-47) that there was an absence of "concrete adverseness" in the proceedings on Chadha's petition for review in the court of appeals.[45] This contention is clearly mistaken, as the court below held (J.S. App. 22a-24a) and as we have explained more fully in our reply brief (at 11-14) in response to the motions to dismiss the INS's appeal in No. 80-1832. See also Chadha Br. 20-23. The Attorney General fully intended to enforce the deportation order issued by the immigration judge unless that order was set aside by the courts.

The House of Representatives' principal contention on the adverseness issue appears to be that this was a "feigned" suit between Chadha and the INS. See, *e.g.*, *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S.

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[45] The House of Representatives also questions (Br. 44-46) Chadha's standing to challenge the constitutionality of Section 244(c)(2). Like the court of appeals (J.S. App. 12a), we find this attack on Chadha's standing somewhat "odd." Chadha has been ordered deported solely because of the resolution of disapproval passed by the House of Representatives pursuant to Section 244(c)(2). See pages 5-6, *supra*. Thus, contrary to the House's contention (Br. 45), Chadha beyond question can trace his threatened deportation directly to the operation of Section 244(c)(2) and the actions taken by the House and the immigration judge pursuant to that Section. He is not, as the House argues, simply asserting the interests of a third party (the Executive Branch) in a separation of powers dispute with Congress or an abstract interest common to all members of the public. This Court held in *Buckley* v. *Valeo*, *supra*, that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." 424 U.S. at 117.

Equally unpersuasive is the suggestion by the House of Representatives (Br. 48) that the separation of powers issue in this case presents a non-justiciable political question. "This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 123.

47 (1971). The House is quite wrong. The immigration judge (in entering the order of deportation) and the Board of Immigration Appeals (in sustaining the order) acted under the compulsion of Section 244(c)(2) and adhered to the established practice of many agencies of declining to rule on constitutional challenges to the statute they are charged with administering, properly leaving such issues to the courts (J.S. App. 71a, 73a; J.A. 49, 52-56). See, *e.g.*, *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 764; *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974). Thus, this case is no more "feigned" than was *United States* v. *Lovett*, *supra*, where the Executive agencies concerned stopped paying the employees' salaries as required by the appropriations rider, but where the Executive agreed with the employees, when they filed suit in the Court of Caims to recover the salaries the agencies had withheld, that the rider was unconstitutional. In *Lovett*, as here, because the Executive supported the argument that the statute was unconstitutional, the defense of the statute was undertaken by Congress itself.

C. There Is No Basis For Withholding A Judgment On the Constitutional Issue Because of An Asserted Unavailability of Relief to Chadha

The Senate (Br. 27-28) and House of Representatives (Br. 49-50) argue that because, in their view, the one-House veto provision in Section 244(c)(2) cannot be severed from the remainder of Section 244, the entire Section must fall if the legislative veto provision is unconstitutional, and Chadha's deportation therefore cannot be cancelled and his status cannot be adjusted under that Section in any event. From this premise, they argue that Chadha should not even be permitted to challenge the constitutionality of Section 244(c)(2), because he would not obtain relief from deportation and permanent resident status as a result of a favorable ruling. It is a sufficient answer to this argument that the one-House veto provision in Section 244(c)(2) clearly *is* severable. See pages 60-65 *supra*. But in addition, this Court has

often held that a party may raise a constitutional claim even if the challenged provision ultimately may not be severable in a way that would entitle the claimant to relief. See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 272 (1979); *Stanton* v. *Stanton*, 421 U.S. 7, 17-18 (1975); *Califano* v. *Westcott*, *supra*, 443 U.S. at 89-91; *id.* at 93-96 (opinion of Powell, J.) (reaching constitutional question while arguing that claimant was not entitled to relief).

The Senate itself acknowledges (Br. 27) that under its approach, no person would be permitted to challenge the constitutionality of Section 244(c)(2); yet Section 244 would remain in effect, allowing some aliens to have their deportation cancelled and their status adjusted, while denying this relief to Chadha and others whose suspensions are disapproved—even if the one-House veto provision that requires this result is unconstitutional. Congress thereby could continue to invoke an unconstitutional procedure without ever having to choose between the only constitutionally permissible alternatives available to it—relying on private bills or permitting Executive Branch determinations to become final in the absence of a duly enacted law overturning them. Moreover, the reasoning of the Senate and House is not limited to Section 244; following their logic, a legislature could insulate *any* unconstitutional aspect of a benefit program from challenge simply by specifying that the constitutionally dubious aspect is not severable from the remainder of the program.[46]

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[46] *McCorkle* v. *United States*, 559 F.2d 1258 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978), the only case cited by the House and Senate, lends no support to their contention. That case involved a challenge to 2 U.S.C. (1970 ed.) 359(1)(B), which provided that one House of Congress could veto pay increases for certain Executive Branch officials after they were proposed by the President. The Senate had disapproved all the pay increases proposed in 1974 (S. Res. 293, 93d Cong., 2d Sess. (1974); 120 Cong Rec. 5508 (1974); S. Rep. No. 93-701, 93d Cong., 2d Sess. (1974)), and an official sued. The court ruled that Section 359(1)(B) was not severable from the provisions permitting the pay increases and therefore denied plaintiff monetary relief without reaching the constitutional question. 559 F.2d at 1261-1262. The court also declined to grant declaratory relief, but it expressly noted that it was doing

D. There Are No Grounds For Remanding the Case to the INS

Finally, the Senate suggests (Br. 17-21) that the Court should not decide the constitutional question because Chadha might have an alternative avenue of relief, in light of the passage of the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102) and Chadha's marriage to a United States citizen during that same year. As the Senate concedes (Br. 19), however, neither event renders this case moot. Moreover, as explained in the Brief of Appellee-Respondent Chadha (Br. 25-26), a remand is not warranted for further exploration of these issues by the INS, because neither Chadha's marriage nor the Refugee Act would form the basis for relief equivalent to that to which Chadha is entitled under the court of appeals' decision. The Ninth Circuit's ruling makes Chadha immediately eligible for citizenship. In contrast, if he were forced to forgo the benefit of the judgment below and instead to pursue the courses suggested by the Senate, he would be eligible for citizenship only at some point several years in the future (even assuming that he first would be granted permanent resident status by pursuing those courses). See J.S. App. 17a-18a n.6.

The Senate argues (Br. 20) that the substantial effect of the decision below on the date on which Chadha is eligible for citizenship should be disregarded by this Court because Chadha sought review in the court of appeals only of a deportation order and because he might at least receive relief from *deportation* on remand. This argument is unavailing. As explained above (see pages 65-67 *supra*), and as this Court held in *Foti* v. *INS*, *supra*, the court of appeals' jurisdiction on a petition for review of a deportation order encompasses the issue of suspension of deportation under Section 244 as well as

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so in large part because the challenged one-House veto provision in Section 359(1)(B) had been repealed while the appeal was pending and a declaratory judgment therefore would serve no useful purpose. 559 F.2d at 1263.

deportation as such. Under Section 244(c)(2) and (d), a grant of suspension of deportation automatically leads to a grant of permanent resident status if the suspension is not lawfully disapproved by Congress. Thus, the date on which Chadha may acquire permanent resident status is intimately bound up with the issues raised in the petition for review. It would make no sense at this late stage in the proceedings to deprive Chadha of the benefit of the judgment below and to force him to relitigate the date on which he acquired permanent resident status (and, therefore, the constitutionality of the one-House veto provision in Section 244(c)(2) of the Act) in the course of the consideration of his petition for naturalization under 8 U.S.C. 1421(a) and 1427(e).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions Involved:

1. Article 1, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 7, Clauses 2 and 3, of the United States Constitution provide:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him,

the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

3. Article I, Section 8, of the United States Constitution provides in pertinent part:

The Congress shall have Power * * *

* * * * *

To establish an uniform Rule of Naturalization, * * *

* * * * *

—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. Article II, Section 1, of the United States Constitution provides in pertinent part:

The executive Power shall be vested in a President of the United States of America.

5. Article II, Section 3, of the United States Constitution provides in pertinent part:

> * * * he shall take Care that the Laws be faithfully executed, * * *.

Statutory Provisions Involved:

1. Section 106(a) of the Immigration and Nationality Act of 1952, as codified at 8 U.S.C. 1105a (a), provides in pertinent part:

§ 1105a. *Judicial review of orders of deportation and exclusion*

(*a*) *Exclusiveness of procedure*

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [Section 242(b) of the Act] or comparable provisions of any prior Act * * *

2. Section 244 of the Immigration and Nationality Act of 1952, as codified at 8 U.S.C. 1254, provides in pertinent part:

§ 1254. Suspension of deportation

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent

residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) Continuous physical presence not required because of honorable service in Armed Forces and presence upon entry into service

The requirement of continuous physical presence in the United States specified in paragraphs 1 and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and (B) at the time of his enlistment or induction was in the United States.

(c) Fulfillment of requirements of subsection (a); report to Congress

(1) Upon application by an alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of

Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(3) In the case of an alien specified in paragraph (2) of subsection (a) of this section —

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Record of cancellation of deportation

Upon the cancellation of deportation in the case of any alien under this section, the Attor-

ney General shall record the alien's lawful admission for permanent residence as of the date of cancellation of deportation of such alien is made, and unless the alien is an immediate relative within the meaning of section 1151(b) of this title, the Secretary of State shall reduce by one the number of nonpreference immigrant visas authorized to be issued under section 1153(a)(8) of this title for the fiscal year then current.

3. Section 406 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 note, provides:

> If any particular provision of this Act [this chapter], or the application thereof to any person or circumstance, is held invalid, the remainder of the Act [this chapter] and the application of such provision to other persons or circumstances shall not be affected thereby.

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